INDEX

CITATIONS

CASES:

Page

Page

STATUTES AND CONSTITUTIONAL PROVISIONS:

Page

Page

ARBITRATION AWARDS:

MISCELLANEOUS:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 69 and 71

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,

Appellants,

—v.—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellees.

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas,

Appellants,

—v.—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR APPELLEES

OPINIONS BELOW

The majority and dissenting opinions of the District Court for the Western District of Arkansas are reported at 239 F. Supp. 1 and appear at R. 227-83.

The national arbitration Award made pursuant to the provisions of Public Law 88-108, sometimes referred to as the Award of National Arbitration Board No. 282, and the opinions rendered in connection with the Award, are reported at 41 Lab. Arb. 673 (1963) and appear at R. 80-174.

Examples of Awards of the local Arbitration Boards relevant to Arkansas (with respect to freight and switch train manning-level questions, other than the fireman question) which were provided for by the national arbitration Award, are set forth at R. 176-185; R. 186-193; and R. 194-202. These Awards were submitted as typical of those relating to the various interstate carriers operating in Arkansas. (R. 174-75) One of these Awards—the one with respect to Missouri Pacific Railroad Company (R. 176)—is reported at 42 Lab. Arb. 917 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Public Law 88-108, 77 Stat. 132, 45 U.S.C following § 157; Arkansas Act 116 of 1907 (Ark. Stat. Ann. §§ 73-720 through 722 (1957)); and Arkansas Act 67 of 1913 (Ark. Stat. Ann. §§ 73-726 through 729 (1957)), are set forth in the Brief for Appellants in No. 69, pp. 43-49, and appear at R. 76-78, R. 22-23, and R. 23-24, respectively.

In addition, there are also involved the Commerce Clause of the United States Constitution, which is set forth in

Appendix I hereto (p. 1a); the National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1, which is set forth in Appendix II hereto (p. 1a); and the Railway Labor Act, 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151 *et seq.*, particularly § 2 and §§ 5 through 10 thereof, which sections are set forth in Appendix III hereto. (p. 2a)

QUESTIONS PRESENTED

1. Does Congress' scheme for compulsory and binding arbitration of the dispute as to the appropriate manning level on freight train and switching crews, set forth in Public Law 88-108, and the national Award and the local Awards relating to Arkansas rendered under that arbitration—which provide for manning levels lower than those provided by the Arkansas laws prescribing minimum railroad crew manning levels—preclude the operation of those Arkansas laws?

2. Does the Congressional scheme of railway labor relations regulation, looking toward "the complete independence of carriers and of employees" and toward "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," embodied in the Railway Labor Act, taken with the Congressional policy for the regulation of interstate transportation expressed in the National Transportation Policy, preclude the operation of the Arkansas laws prescribing minimum railroad crew manning levels?

3. Do the Arkansas laws in question amount to legislation discriminatory against interstate commerce, in violation of the Commerce Clause?

STATEMENT

This is a direct appeal from a final judgment entered on March 8, 1965, by a district court of three judges convened pursuant to 28 U.S.C. §§ 2281 and 2284, which declared two Arkansas railroad "crew consist" laws to be in substantial conflict with Public Law 88-108 and therefore unenforceable against appellees, and which granted an injunction against the enforcement of the Arkansas laws. (R. 284-85)

1. *The background of Public Law 88-108.*[1]—In 1959 and 1960 virtually all of the nation's railroads on the one hand, and the five national operating brotherhoods on the other, served notices pursuant to Section 6 of the Railway Labor Act as to the subject of the "consist" [2] of engine and train crews. (R. 43) The railroads proposed to eliminate requirements for the use of firemen on diesel engines and requirements of stipulated numbers of other crew members in freight and yard service, and to restore these matters to management discretion. The brotherhoods' proposals were to establish new national rules fixing the minimum crew consist in all classes of train service as an engineer, a fireman, and a conductor and two trainmen. (R. 61, 66, 72)

When negotiations between the parties failed to produce agreement, a Presidential Railroad Commission was established in 1960 to investigate the facts and make recommendations for the resolution of the dispute arising out of

---

[1] The circumstances giving rise to the enactment of Public Law 88-108 are thoroughly reviewed in the opinion of the district court. R. 239-43; 239 F. Supp., at 9-11.

[2] Used as a noun in this area.

the notices. The Commission engaged in an intensive thirteen month study of the issue, which included hearings, independent studies, and field trips to examine actual railroad operations.[3] In 1962 the Commission issued a report which was supported by detailed findings on all aspects of the dispute, with special emphasis on safety.[4] The report recommended the elimination of firemen on diesels in freight service, as well as the adoption of procedures whereby the number of brakemen and switchmen would be reduced. The Commission also proposed liberal allowances for persons thus separated from service.[5] These recom-

---

[3] In describing its work, the Commission stated: "Never in American history have railroad labor relations been more thoroughly examined or more fully ventilated than during this past year." Report of the Presidential Railroad Commission (1962), p. 10. (Henceforth, Pres. Comm'n Rep.)

[4] See Pres. Comm'n Rep., pp. 9, 11, 35-50, 53-64. See also the extensive discussion of the safety factors in the dissents, as well. *Id.*, at 189-226, 237-46, 266-67.

[5] The Commission's Report recognized that a nationwide solution of the problem was urgently called for—not one impeded by a multiplicity of varying state laws. The Report also recognized that the solution which it recommended—the elimination of firemen in freight service and a reduction in force of brakemen and switchmen, in each case attended by liberal compensation provisions for persons displaced—was a solution which required nationwide application. But because the Commission was an advisory body, its actions could neither bind the parties nor supersede the inconsistent state laws:

> "[M]ost of the legislation of this kind was enacted prior to 1920. The laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge." Pres. Comm'n Rep., p. 64.

As developed below, pp. 14-15, *infra*, the Arkansas laws in question were enacted in 1907 and 1913.

mendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the brotherhoods. (R. 240-41; 239 F. Supp., at 9-10)

An effort at mediation through the National Mediation Board was then attempted. When the Board made a proffer of arbitration pursuant to Section 5 of the Railway Labor Act, the railroads agreed, but the brotherhoods rejected the proffer. The National Mediation Board was consequently forced to terminate its services. R. 241-42; 239 F. Supp., at 10. See *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963) (holding that the parties were left to self-help at that point unless the President established an Emergency Board).

Under Section 10 of the Railway Labor Act, the President then created an Emergency Board to investigate and make recommendations respecting the dispute. After careful study, the Emergency Board made proposals aimed at eliminating unnecessary positions, and, at the same time, assuring safety on the railroads.* Although its recommendations were in many respects more favorable to the brotherhoods than those of the Presidential Railroad Com-

---

*The Board recommended that the carriers be given the right to eliminate firemen's jobs, subject to challenge by the brotherhoods on the ground that "discontinuance of the job . . . would unduly endanger safety or unduly burden other employees." The Board suggested that the remaining crew positions be reduced only by natural attrition, and that any manning-level issues in this regard be resolved by local negotiations pursuant to national guidelines "based on considerations of safety and efficiency." Where the parties could not reach agreement, a special referee system was proposed to resolve all disputes.

The Emergency Board also recommended generous severance allowances for firemen whose positions were thus eliminated. See Report to the President by Emergency Board No. 154, incorporated in Hearings before the House Committee on Interstate and Foreign Commerce on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 45-47 (hereinafter referred to as "House Hearings").

mission, the Emergency Board's recommendations, submitted on May 13, 1963, were agreed to by the railroads but turned down by the brotherhoods. (R. 242; 239 F. Supp., at 10)

In the face of a clear threat of a nationwide rail strike, President Kennedy on July 22, 1963 requested passage of legislation to deal with the train-manning controversy. President Kennedy's request was for legislation empowering the Interstate Commerce Commission to approve, disapprove or modify work rules changes submitted to it on which the parties could not come into agreement. (R. 52-54) Rules so put into effect would have simply the status of "interim rules" and be operative for a two-year period. (§ 4, R. 53) The President's message stressed that, in his view, this method had certain advantages over a scheme of compulsory arbitration. (R. 49)

Congress' response to this request was in somewhat different terms from that requested by the President. Congress proceeded on August 28, 1963 to enact Public Law 88-108, which, despite the President's recommendation to the contrary, imposed a compulsory arbitration solution on the parties. The Act established a seven-man arbitration board, which was directed to determine the issues raised by the parties in their notices with respect to the manning-level question. In this regard, Section 3 empowered the Board to "resolve the matters on which the parties were not in agreement" and to make a binding award which "shall constitute a complete and final disposition of the ... issues."

The Arbitration Board was not left at large as to the standards by which it should be guided in making its award. Section 7(a) of the Act provided express guidelines.

The standards laid down by Section 7(a) were:

(1) "The effect of the proposed award upon adequate and safe transportation service";

(2) "The effect of the proposed award upon . . . the interests of the carrier and employees affected"; and

(3) "Due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

The Act—unlike the President's proposal—integrated its compulsory arbitration provisions into the existing scheme of labor-management relations provided for by the Railway Labor Act, by providing that the arbitration should be conducted, where applicable, pursuant to Sections 7 and 8 of that Act, and that the award should be filed in the manner provided for by the Act. (§ 4, R. 77)

2. *The Award.—(a) As to Firemen.*—The Arbitration Board concluded that, in general, the use of firemen in diesel freight service and in yard service was unnecessary. Its Award accordingly provided for the elimination of 90% of the firemen's jobs in each local seniority district. (R. 83; 41 Lab. Arb., at 675) The local brotherhood chairman in each case was given the right to designate which positions would comprise the 10% retained. Exceptions were provided, however, for yard locomotives which were not equipped with "a dead-man control in good operating condition," as to which locomotives a fireman was unconditionally required;[7] and for enough jobs to provide employment for firemen who were being retained in service

[7] For the background of this requirement, see note 10, p. 11, *infra*.

pursuant to the employment protective provisions of the Award.[8]

It was through the last-mentioned provisions that the Award accorded generous employment protection to the firemen. Thus, in general, the Award provided that any fireman with at least ten years' seniority had to be retained in engine service, that is, as a fireman or an engineer. (Award, para. II C(7), R. 87; 41 Lab. Arb., at 677) As noted above, sufficient extra jobs were required to be provided to accommodate these firemen. Furthermore, any fireman with between two and ten years' seniority, the Award provided, had either to be retained in engine service, or offered a comparable position. If he accepted the comparable position offered, he had to be paid a relocation allowance, and be guaranteed annual earnings, for a five-year period, equal to his last year's earnings prior to the transfer. Even if the fireman refused to accept the proffered position, he was to receive a very substantial severance allowance. (Award, para. II C(6), R. 86-87; 41 Lab. Arb., at 676-77) While the Award provided that the employment of firemen with under two years' seniority might be terminated, that

---

[8] The core of the Award, as far as it effects a reduction in jobs for firemen, is paragraph II B(5):

"After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a dead-man control in good operating condition." (R. 84; 41 Lab. Arb., at 675)

termination could only be accomplished, the Award provided, upon the payment of substantial severance allowances. (Award, para. II C(2), R. 85; 41 Lab. Arb., at 676)

(b) As to Brakemen and Switchmen.—The basic approach of the Award for resolution of the other issues relating to manning levels was to direct that these questions be resolved by binding arbitration by subordinate, local arbitration boards. The Award, accordingly, made provision for a binding local arbitration procedure whereby the number of crew members—apart from firemen—to be used in road freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. (Award, para. III B(1), R. 91; 41 Lab. Arb., at 678)

However, while the local Special Boards of Adjustment were to have power to determine questions of manning level, and thereby to reduce the requirements for the number of jobs on each train, the National Board itself imposed an overall requirement, cutting across the actions to be taken by the local boards. This was the employment protection condition which it imposed to guarantee that there would be no discharges of personnel as a result of the reduction in jobs on each train.

This protective provision was contained in paragraph III D of the Award. In general, it provided that all train service employees on the effective date of the Award were entitled to continue to work in train service until their employment was terminated by natural attrition, such as by death, disability, retirement, or discharge for cause. (R. 94; 41 Lab. Arb., at 679-80)

(c) Safety Considerations.—In determining that the carriers should be free to abolish 90% of the firemen's positions, and in assessing the remaining crew consist issues,

the Board conducted extensive proceedings,[9] which focused principally upon the question of safe operations of the trains. The Award itself specifically mentions that consideration was given to the safety issue, and directs the parties to base the procedure for determination of the 10% of firemen's positions to be retained "upon consideration of safety, undue work burden, and adequate and safe transportation service to the public." (R. 83; 41 Lab. Arb., at 675) It also requires that firemen be used on all yard locomotives not equipped with an efficiently operating dead-man control.[10] (R. 84; 41 Lab. Arb., at 675)

The thoroughness with which the Board studied the safety issue is typified by the opinion of its neutral members:

> "Of these three considerations [safety, burden on other crew members, and adequacy of service], that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.

---

[9] The opinion of the neutral members states:

"The Board has today completed the task which Congress set it. After holding twenty-nine days of hearings, receiving the testimony of more than forty witnesses recorded in almost 5,000 pages of transcript, examining more than 200 documentary exhibits, together with a number of motion pictures, photographs, and charts, making inspection trips to four railroad yards in the Chicago area and discussing the issues at length in executive session, the Board has executed and filed its award on the fireman and crew consist issues." R. 108; 41 Lab. Arb., at 685.

[10] This provision was in similar terms to one of the recommendations of the Report of the Presidential Railroad Commission. See Pres. Comm'n Rep., pp. 43-44. This was the only specific circumstance identified by the Presidential Commission as one in which the demands of safety required that there be a fireman.

"This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel . . . " (R. 116; 41 Lab. Arb., at 688)

The opinion accordingly analyzed each of the reasons offered for retaining firemen on freight trains in terms of any possible impact that the elimination of firemen could have on safety. (R. 112-16; 41 Lab. Arb., at 687-88)

This preoccupation with safety considerations not only permeates the Board's opinion as to the fireman question, but is manifest in the standards laid down by the National Board for application by the local Special Boards of Adjustment. The guidelines imposed on the local boards by the National Board relate almost exclusively to safety factors.[11]

---

[11] The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

"C(2). General Considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(*footnote continued on next page*)

(d) The Local Awards as to Arkansas.—The Local Special Boards of Adjustment have made local Awards with respect to the operations of each of the appellees in Arkansas. The Awards so made regarding the Missouri Pacific Railroad Company and the Texas and Pacific Railway Company were submitted as typical. (R. 174-75)

These local Awards, which are substantially the same as to each carrier, in essence provide that there will be two brakemen on main line local freight trains; one brakeman on branch line operations; and one helper on yard engine service, except that no helper will be required in certain yards, including the Paragould yard in Arkansas. (R. 185; 42 Lab. Arb., at 921)

In these Awards, once again, the most liberal employee protection provisions were provided, because of Paragraph III D of the national Award which provided in essence that although jobs might be eliminated through these Awards, employment could be reduced only by natural attrition. See p. 10, *supra;* R. 183-84; 42 Lab. Arb., at 920.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train-to-way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew." (R. 92-93; 41 Lab. Arb., at 679)

Like the National Award, the local Awards bespeak a concern with, and a full consideration of, the safety factors involved, (R. 179, 182-183; 42 Lab. Arb., at 918, 919-20) and recognize that "basically" all the relevant guidelines under which the Awards were made "relate to safety of operation or workload." (R. 178; 42 Lab. Arb., at 918)

3. *The Arkansas Laws.—(a) Manning-Level Requirements.*—The two Arkansas laws in question were enacted in 1907 and 1913. The 1907 legislation[12] relates to freight trains and provides, with certain exceptions which will be discussed below, that no freight train may have a crew "consisting of less than an engineer, a fireman, a conductor, and three (3) brakemen, regardless of any modern equipment . . ."

The 1913 legislation[13] relates to switch crews operating in cities of the first and second class where switchings are being made "across public crossings within the city limits." This Act provides, with certain exceptions which will be related below, that each such crew must consist of "one (1) engineer, a fireman, a foreman, and three (3) helpers." Both Acts have been applied to diesels though their use was unknown in 1907 and 1913. (R. 29)

Thus, while the national arbitration Award, in effect, permits the abolition of 90% of the firemen's positions on diesels in each locality, the Arkansas Act of 1907 requires a fireman on each train. Again, the relevant local Awards as to freight operations provide for two brakemen on main line operations and one brakeman on branch line opera-

---

[12] Act No. 116 of 1907, Ark. Stat. Ann. §§73-720 through 722. (R. 22-23)

[13] Act No. 67 of 1913, Ark. Stat. Ann. §§73-726 through 729. (R. 23-24)

tions, while the 1907 legislation provides for three brakemen in each case. In switching operations the relevant local awards provide for one helper except in certain situations —such as the Paragould, Arkansas, yard—where only a foreman is required; the Arkansas Act of 1913 provides that in each case there shall be three helpers besides the foreman.

While there is legislation similar to that of the Arkansas legislation in seven states,[14] no state legislation provides for higher manning levels than the Arkansas legislation and generally the statutes provide for lower levels.[15] The annual cost of the appellees' compliance with the Arkansas laws exceeds $6,000,000.[16] (R. 238; 239 F. Supp., at 8)

(b) The Exceptions.—The Arkansas 1907 legislation, relating to manning levels on freight trains, provides exceptions for railroad companies whose lines are less than fifty miles in length, and for trains of less than twenty-five cars. Ark. Stat. Ann. § 73-721. (§ 2, R. 22) The 1913 legislation, regulating the manning levels on switch operations, provides an exception for companies "operating railroads less than one hundred (100) miles in length." Ark. Stat. Ann. § 73-728. (§ 3, R. 23)

---

[14] For an analysis of the rapidly dwindling number of states that have such legislation, see note 36, p. 57, *infra*, and note 7, p. 73, *infra*.

[15] Only Indiana, Nebraska, New York, and Washington impose the same manning requirement on freight trains as does Arkansas —a six-man crew consisting of an engineer, a fireman, a conductor, and three brakemen (or, in some cases, two brakemen and one flagman). While New York, Ohio, and Indiana specify that five men be used in switching operations, no state other than Arkansas requires six-man crews for these operations. (For a complete list of citations to relevant state laws, see note 7, p. 73, *infra*.)

[16] Computed by comparing costs under the Awards with those under the Arkansas laws.

All the seventeen intrastate railroads operating in Arkansas have less than fifty miles of track (R. 203-04, 208-11)[17] and accordingly are exempt from both Acts. Ten of the eleven interstate railroads operating in Arkansas have over fifty miles of track and accordingly must comply with the 1907 legislation relating to manning levels on freight trains. Eight of the eleven interstate carriers have over 100 miles of track and accordingly are subject to the 1913 switching crew minimum manning-level legislation. (R. 203-04)

4. *The Present Action.*—This action was commenced on April 10, 1964, by the present appellees, six interstate railroads operating in Arkansas, against certain state prosecuting attorneys (appellants in No. 71), seeking an injunction against their continued enforcement of the Arkansas "crew consist" laws. (R. 1-22) The railroad brotherhoods, appellants in No. 69, intervened. (R. 24-27)

The contention of appellees was that the Arkansas laws had been superseded by Public Law 88-108 and the Awards rendered under it; that, in any event, they had been super-

---

[17] The records of the Arkansas Commerce Commission placed in evidence in the district court show that each of the intrastate railroads has less than one hundred miles of line and is consequently exempted from the switch crew law. (R. 203-04) Although the Commission records indicate that two of the intrastate carriers have over fifty miles of trackage, additional affidavits made by officials of the carriers demonstrate that both companies have less than that amount and are therefore exempt from the Arkansas freight crew law. Thus, one of these carriers has less than twenty miles of line. (R. 210-11) Similarly, the other such carrier reported its total trackage to the Commission on the basis of a tabulation which erroneously included certain portions of switching track so that in actuality that company also has less than fifty miles of line and therefore does not comply with the 1907 freight crew law. (R. 208-09) The affidavits make clear that neither carrier observes either the 1907 or 1913 laws, each using a five-man crew for all operations. (R. 209, 211)

seded by the Railway Labor Act and the National Transportation Policy; that the laws amounted to an unconstitutional discrimination against interstate commerce; that the laws constituted an unconstitutional burden on interstate commerce; and that the laws violated the Equal Protection and Due Process Clauses.

The contentions as to the effect of the Federal legislation, and the Equal Protection and unconstitutional discrimination contentions, were brought on by appellees through a Motion for Summary Judgment. (R. 40-41) The district court granted the Motion for Summary Judgment on the ground that the Arkansas laws were "in substantial conflict with Public Law 88-108," concluding:

> "The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrate the national scheme of regulation, and must be deemed superseded by the federal legislation." R. 275; 239 F. Supp., at 27-28.[18]

The prosecutors and the Brotherhoods appealed to this Court, and probable jurisdiction has been noted.[19] (R. 296)

---

[18] Largely because of the holding of this Court in *Missouri Pac. R. Co.* v. *Norwood*, 283 U.S. 249 (1931), that these state laws were not preempted by the Railway Labor Act and the Interstate Commerce Act, as those federal statutes then stood, the dissenting judge deferred to this Court with respect to an application of the preemption doctrine based on the federal statutes as they now exist. However, on the merits of the preemption question he did observe: "I recognize that a strong case can be made for preemption in the situation here presented." (R. 282; 239 F. Supp., at 32)

[19] On March 27, 1965, after the district court had unanimously declined to stay its injunction (R. 286-87), Mr. Justice White granted a stay of that injunction. (R. 294)

SUMMARY OF ARGUMENT

I.A. 1. The Arkansas manning-level laws conflict with Congress' compulsory arbitration solution to the railroad manning-level controversy, Public Law 88-108, and with the Arbitration Awards rendered under it, and accordingly cannot be enforced. The decisions of this Court teach that even a collective bargaining contract entered into pursuant to the National Labor Relations Act or the Railway Labor Act supersedes the terms of inconsistent state legislation touching on labor-management relations. *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959); *California* v. *Taylor*, 353 U.S. 553 (1957). And the Awards rendered under the compulsory arbitration law are more than simply collective bargaining agreements. They are the binding directives of public agencies exercising the delegated powers of Congress and considering and resolving the public interest factors specified by Congress. Accordingly, it follows *a fortiori* that the Awards supersede the inconsistent Arkansas statutes.

2. (a) There can be no question that the Awards and the Arkansas statutes are inconsistent. The National Award says that in general firemen need not be used on freight trains while the Arkansas statute says they must. Likewise, the Awards provide for a lower level of crew manning than the six men prescribed by the Arkansas statute. (b) It ignores the background of the Awards to say that there is no conflict because the carriers could comply with the Arkansas statutes without affirmatively violating the Awards. The question at issue in the dispute, and resolved by Public Law 88-108 and the Awards was, at what level were the railroads to be permitted to man

the trains? The intent of the legislation and of the Awards was not simply to establish minimum crew levels but to permit management to operate at that specified manning level.

B. The Arkansas laws may not be sustained as "local health or safety regulations" which might stand alongside the federal provisions. 1. Whatever may be the effect of the Arkansas manning level statutes on safety, they have a direct impact on what has been the central labor-management problem of the railroads for over a decade—the number of jobs to be provided on each train. These statutes are quite different from the usual state safety laws as to safety appliances, purity of water supply, sanitary facilities and the like. They are directed at the economic core of labor-management problems in the railroad industry.

2. Moreover, the federal Boards which produced the Awards were expressly and primarily directed by Congress to take into account, in making their Awards, the safety implications of the question of manning levels. It is plain that the Boards carefully and painstakingly did so. Thus, Congress here took in hand the entire problem of manning levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the problem. It authorized and directed the Boards to make an Award dispositive of the whole matter, and the Boards have done so. Since Congress has taken in hand the entire subject, including whatever safety implications it has, the state statutes cannot be sustained on any basis.

C. The legislative history of Public Law 88-108 is consistent with supersession of the state manning level laws. 1. The classic tests of legislative history and purpose that

have been followed by this Court in labor preemption cases all lead to the conclusion that the state laws have been superseded here. The problem with which Congress was faced was a nationwide problem. Congress' intention to take the entire subject in hand and provide a national solution for it was manifest. Its solution was inconsistent with the survival of the state laws. 2. The random contrary expressions in the legislative history are primarily directed at rejected forms of the legislation, or are simply predictions of what the courts would hold. Indeed, even on this level, the central fact is that after repeated recognition before Congress of the possibly preemptive effect of the legislation it was about to pass, and despite the fact that the legislation was subject to repeated amendment, no saving clause for the state manning-level laws was included.

D. The effect of Public Law 88-108 is permanently to supersede the Arkansas laws. To be sure, Section 4 of the legislation—following the language of Section 8(j) of the Railway Labor Act as to the duration of an arbitration Award—provides that the Award "shall continue in force" for two years; but it does not follow that state laws revive upon the expiration of that period. 1. Congress adopted the general structure of the Railway Labor Act in dealing with this dispute, and incorporated the compulsory arbitration Award into its framework. The Railway Labor Act contemplates a continuity of relationship between the parties of a much greater degree than is contemplated by the National Labor Relations Act. Under the Railway Labor Act, the terms of employment fixed by agreement or by arbitration award remain in effect until changed in the manner provided in that Act. Accordingly, while during the two-year period the Award, like any Award under the Railway Labor Act, is not subject to change under the

Act's provisions, thereafter, the terms and conditions of employment it fixed, like those fixed by any other award, remain in effect indefinitely unless changed pursuant to the Act. Thus, as the Award rendered under Public Law 88-108 created a continuing status between the parties, it also created a continuing supersession of the Arkansas laws.

2. Moreover, the terms of the Award—which terms were, on the basis of the prior recommendations of various public bodies, in their general outlines quite clearly contemplated by Congress—negate any possibility of a revival of the state laws after the two-year period. For the Award contemplated generous separation allowances for the displaced employees. These provisions were totally inconsistent with any notion that the state laws would revive after the two years and require the railroads, after paying millions of dollars in severance pay, to rehire the separated employees or to hire others in the jobs declared by the Awards to be superfluous. When Congress enacted Public Law 88-108 and sanctioned a solution of the dispute inconsistent with the state laws, the status quo was completely altered. It would disrupt peaceful labor relations and the fabric of the Railway Labor Act to hold that after the Award expires the framework established by the Railway Labor Act for the revision of the terms of the Awards could be totally disregarded and the state laws could come back into effect.

II. Even if the terms of the Awards had been reached through the collective bargaining process, those terms would have superseded the Arkansas laws by reason of the Railway Labor Act and the National Transportation Policy.

1. The Railway Labor Act provides a comprehensive scheme for the resolution of disputes between carriers and employee associations through bargaining, mediation and arbitration. Basic labor-management problems in the railroad industry are generally nationwide, as was the dispute in question here. Under this Court's decisions interpreting the effect of collective bargaining agreements under the National Labor Relations Act and the Railway Labor Act, a collective bargaining contract containing the terms in question would supersede the terms of an inconsistent state law. *California* v. *Taylor, supra; Teamsters Union* v. *Oliver, supra.*

2. If there is to be any limit in the name of safety put on the solutions that the parties could reach as to manning levels, it is clear that that limit should come from a federal statute. Any other source of limitation, in view of the national interests in the whole subject matter—including the safety aspects—indicated by the Railway Labor Act and the National Transportation Policy, would lead to chaotic divergences and would frustrate the Congressional purpose inherent in the Railway Labor Act.

III. The Arkansas laws amount to an unconstitutional discrimination against interstate commerce. Their exceptions, though phrased in general terms, as a practical matter exempt all the intrastate railroads while including virtually all the interstate railroad mileage. Discrimination of this nature against interstate commerce, this Court's decisions indicate, is forbidden by the Constitution. It does not matter whether the discrimination against interstate commerce lies on the face of the statute or whether it is simply inherent in its practical operation.

The Arkansas statutes may not be sustained on the supposition that there is any rational basis—apart from discrimination—for the pattern of coverage which they impose. The fact of the matter is that there is no such basis. The 1913 switch crew legislation bases its coverage on the overall length of lines operated by a carrier. But plainly there is no relationship whatsoever between the overall length of a carrier's line and whether its local switching operations require a six-man crew. Similarly, the 1907 freight train legislation, which likewise makes its coverage depend simply on the basis of overall length of the carrier's line, has no rational nondiscriminatory basis for its inclusions and exclusions. Since there is no basis, apart from a discrimination against interstate carriers, which may be presented on behalf of the pattern of coverage of the Arkansas statutes, they clearly constitute an impermissible discrimination against interstate commerce.

I. THE ARKANSAS FULL CREW LAWS ARE IN CONFLICT WITH PUBLIC LAW 88-108 AND THE AWARDS UNDER IT, AND ARE THEREFORE UNENFORCEABLE UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. An Arbitration Award Rendered Pursuant to an Act of Congress Regulating Labor-Management Relationships in Interstate Commerce Supersedes Inconsistent State Laws Regulating That Relationship.

1. The decisions of this Court in the past twenty years leave no room for doubt as to the superseding effect of federal labor legislation, passed pursuant to Congress' paramount powers to regulate interstate commerce, on inconsistent state legislation regulating the labor-management relationship, or on state legislation touching that re-

lationship which poses a possibility of interference with the federal scheme. *Hill* v. *Florida*, 325 U.S. 538 (1945); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 771-72, 775-76 (1947); *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 18, 24-27 (1949); *United Automobile Workers* v. *O'Brien*, 339 U.S. 454, 456-59 (1950); *Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 383, 389-90 (1951); *Garner* v. *Teamsters Union*, 346 U.S. 485, 488-91, 500-01 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 231-32 (1956); *Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1 (1957); *California* v. *Taylor*, 353 U.S. 553, 559-61 (1957); *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295-97 (1959); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244-45 (1959); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963); *Teamsters Union* v. *Morton*, 377 U.S. 252, 258-61 (1964).

Central to the federal scheme of labor-management regulation, both in industry generally under the National Labor Relations Act and specifically in the railroad industry under the Railway Labor Act, is the collective bargaining contract. Formation of these contracts by the parties, and self-regulation of their relationship through them, is a basic goal of federal policy. And in one of the leading cases, this Court has held that a state statute must give way to the terms of a collective bargaining agreement negotiated pursuant to the provisions of the National Labor Relations Act: "The paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress." *Teamsters Union* v. *Oliver*, 358 U. S. 283, 296-97 (1959). See also

General Drivers Union v. *American Tobacco Co.*, 348 U. S. 978 (1955).[1]

Similar results have been held to follow under the Railway Labor Act, which, like the National Labor Relations Act, establishes a national policy of uniform application.[2]

---

[1] In the *General Drivers* case, this Court reviewed a state court decision compelling employees of a common carrier to cross certain picket lines, even though their collective bargaining agreement negotiated pursuant to the National Labor Relations Act permitted the employees to refuse to take such action. The decision of the state court was based on a Kentucky statute requiring common carriers to handle the merchandise of all shippers without discrimination. 264 S.W.2d 250, 254-55 (Ky. 1953). This Court considered the Kentucky decision to be so clearly at odds with its previous rulings in the preemption area that it unanimously reversed in a *per curiam* opinion.

[2] In the *Oliver* case, the Court declared that the state law was superseded by the parties' agreement because: "The application [of state law] would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . ; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." 358 U.S., at 296.

For each of the factors recited by the Court in its opinion in the *Oliver* case which expounds why a collective bargaining contract under the National Labor Relations Act supersedes inconsistent state law, there is a complete correspondence in the Railway Labor Act and the decisions interpreting it. Thus, the Railway Labor Act imposes upon the parties a duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." §2 First. Federal law is applicable to the agreement the parties make in response to that duty. *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Federal law sets outside limits to what the agreement may

Thus, this Court has held state legislation inconsistent with railroad collective bargaining contracts to have been superseded by the Railway Labor Act. In *California* v. *Taylor*, 353 U.S. 553, 561 (1957), the Court said:

> "Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally-protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws." [3]

Accordingly, even if the Awards made pursuant to Public Law 88-108 were regarded simply as collective-bargaining agreements made under the authority of an Act of Congress, their terms would supersede conflicting state laws. But the Awards are something more than simply collective bargaining agreements. They are binding directives, made by arbitration boards exercising the delegated powers of the Congress, and considering and resolving the public interest factors as specified by Congress. Congress lawfully delegated to the National and local boards its unquestionable authority to fix minimum train crew employment levels on the nation's railroads.[4]

---

provide, in terms of such legislation as the antitrust laws, the various federal Acts relevant to railroad safety (see note 11, p. 76, *infra*), and the rules and regulations of the Interstate Commerce Commission.

[3] The conflicting provisions of the collective bargaining contract in *Taylor* related to promotions, layoffs and dismissals, and to rates of pay and overtime. 353 U.S., at 555. See also *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956).

It is revealing that the appellants in No. 71 neither cite nor discuss either *Oliver* or *Taylor*—the two leading cases in this area!

[4] In an action brought to enjoin the incitement of strikes in violation of the Award, the court stated: "The award is final and

Accordingly, it follows *a fortiori* from the fact that a private collective bargaining contract negotiated under authority of one of the two basic national statutes regulating labor relations—the National Labor Relations Act and the Railway Labor Act—would supersede inconsistent state labor-management legislation, that the acts of a public body functioning under similar authority would have this effect on inconsistent state legislation.

2. (a) Certainly there can be no question as to the inconsistency between the federal Awards and the two Arkansas statutes. The conflict between the Arkansas minimum train crew consist laws and the arbitration Awards entered under Public Law 88-108 is obvious and clear. The Act empowers and directs the Arbitration Board to resolve the question as to the necessity of freight train firemen and to fix the minimum size of train and switching crews. This was at the heart of the vexed question which the Board was directed to take in hand. The Board has done so. It has declared that in general firemen are not to be required;[5] and, through the local Boards, that certain

---

binding on both sides and must be obeyed by all parties. Since the arbitration was conducted under the aegis of Congress, the award becomes part of the law of the land." *In re Certain Carriers*, 229 F. Supp. 259, 260 (D.D.C. 1964).

None of the appellants here raise any question respecting the validity of the Award of Arbitration Board No. 282. Its validity was sustained in all respects in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C. 1964), where it was held that Congress had in this instance made a lawful delegation of its legislative power to the Arbitration Board. The Court of Appeals affirmed, 331 F.2d 1020 (D.C. Cir. 1964), and this Court denied certiorari, 377 U.S. 918 (1964).

[5] The original notice of the carriers under Section 6 of the Railway Labor Act sought the elimination of "all agreements, rules, regulations, interpretations, and practices, *however established*,

specified numbers of brakemen, switchmen and helpers may be used in various operations. The Arkansas laws, however, purport to require that a fireman shall be used in virtually all train operations by interstate carriers. They also purport to fix the size of train crews and prescribe levels which are in excess of those fixed by the local Awards provided for by the Board. The Commerce Clause and the Supremacy Clause ordain that the conflict must be resolved in favor of the Awards entered under the federal mandate.

The nature of the conflict may more clearly be imagined when it is considered that, under appellants' theory, it is not simply Arkansas and the other six states that have such laws that are to be free to apply their railway manning-level requirements, the terms of the federal Award notwithstanding.—Obviously, there is no room for any "grandfather clause" in this aspect of constitutional law. If Arkansas and six other states can apply their laws, the other forty-three states—or for that matter municipalities within those states[6]—could enact and apply manning-level laws. (See Appts. Br. No. 71, p. 31)[7] More-

---

applicable to any class or grade of train, engine, or yard service employees, which require the employment or use of firemen (helpers) on other than steam power. . . . " (R. 61) (Emphasis supplied) See also the notice as to train crew manning levels. (R. 66) The notice did not make any exception for regulations established by color of state law, ordinance, or administrative rule.

[6] See note 8, p. 74, *infra*.

[7] It is interesting to note that four of the six states submitting a joint brief as *amici curiae* in this case (Georgia, Louisiana, South Dakota, and Montana) do not presently have railroad crew consist laws. While they disavow any specific interest in the passage of such legislation, it is clear that, under the position they advocate, these four states as well as over thirty others could do precisely that. Moreover, recent state court decisions in Texas and Indiana

over, Arkansas and the other forty-nine states might not be content with requiring six men to ride every freight train, but might choose to impose a requirement that seven or eight men ride every one.

A brief reflection on this should make plain the conflict between the Award and the Congressional legislation on the one hand and the Arkansas statutes on the other. Congress passed Public Law 88-108 with the knowledge that the result would be some reduction of railroad crew manning levels in the direction of the present state of railroad technology. It knew approximately what the Arbitration Board would do, because it had before it the generally consistent findings of both the Presidential Railroad Commission and the Emergency Board. But under appellants' theory, the states are left free completely to set aside the intent of Congress and the Award, and in fact to require increases in train manning levels.

Thus the fact that these manning-level laws need not be peculiar to Arkansas and a few other states not only points up the conflict between these laws and the purposes of the Congressional Act and the Awards under it, but makes more vivid the reasons, taught by the prior decisions of this Court, why those laws must be deemed to be superseded.

(b) The District Court rightly rejected the fallacious argument that there was really no conflict between the federal and state requirements as to crew manning levels because both spoke in terms of minimums, so that the rail-

---

have invalidated those states' laws. See note 36, p. 57, *infra*. Thus the interest of all six states lies only in future state legislation.

roads could comply with the state statutes without affirmatively violating the Awards.[8]

This argument is as much at variance with the precedents as it is lacking in contact with the realities of the situation which required Congress to act. The whole point of the issue before Congress and the Arbitration Board was: at what level of crew manning were the railroads to be authorized to operate trains? The intent was not simply to establish a minimum but to permit management to operate, in its discretion, at that minimum. The management proposals, from the outset, were to "eliminate" "requirements" for firemen or for specific numbers of crew members. (R. 61, 66) Thus, the controversy was not about minimum manning levels in the abstract, but about the manning levels which, as a practical matter, management was to be free to adopt. It would completely frustrate the effect of the Award for the states to be permitted to declare that the railroads were not authorized to have their trains manned at the levels permitted by

---

[8] Since the decision below, one state court seems to have accepted this erroneous contention in a decision on the Wisconsin full crew laws. *Chicago & N.W. R. Co.* v. *La Follette*, 135 N.W.2d 269, 277-78 (Wisc. 1965). (The Wisconsin case is still pending in the lower state courts on other constitutional issues.)

One other state court has also held that the full crew laws are not preempted by Public Law 88-108. *New York Central R. Co.* v. *Lefkowitz*, 46 Misc.2d 68, 259 N.Y.S.2d 76 (Sup. Ct. Westchester Cty. 1965). But see *Switchmen's Union* v. *Erie L. R. Co.*, Sup. Ct. Erie Cty., N.Y. (1965), where another lower court of the same state followed the decision reached by the three-judge district court in this case.

The Texas courts have reached a result similar to that reached by the district court in this matter. They have held the Texas manning-level legislation invalid, among other grounds, on the basis of preemption by Public Law 88-108 and the Awards thereunder. *Texas* v. *Southern Pac. Co.*, 392 S.W.2d 497 (Tex. Civ. App. 1965), *writ of error refused "no reversible error,"* Texas Supreme Court.

the Board. It would take away an area of management discretion and economic freedom which the Board intended the railroads to have.

In this context, the contention that there is no conf[illegible] because the federal law does not require use of only minimum crew is completely unrealistic and un[illegible] Analogies are presented by several of the decisions o[illegible] Court. It has been held by this Court in this area that where federal law authorizes—though it does not require—a particular collective bargaining agreement, state legislation prohibiting it must give way. Thus, in *Teamsters Union* v. *Oliver, supra,* the mere fact that federal law authorized the parties to enter into the contract in question—although it certainly did not require them to enter into a contract containing those terms—was sufficient to prevent application of a state law which prohibited the arrangement. Likewise, in *Franklin National Bank* v. *New York,* 347 U.S. 373 (1954), it was held that national banks could advertise the existence of their "savings" accounts, despite a state statute which forbade any but certain specified banks from using the word "savings" in advertising. This holding was reached simply on the basis of the authorization in the National Bank and Federal Reserve Acts to national banks to accept savings accounts—although the national banks were perfectly free, as a matter of federal law, not to advertise the availability of savings accounts or not to use the word "savings" in their advertising.[9]

In short, there can be no doubt that a very real conflict exists between the Awards rendered pursuant to Public

[9] See also *Teeval Co.* v. *Stern,* 301 N.Y. 346, 364-65, 93 N.E.2d 884, 892 (1950), *cert. denied,* 340 U.S. 876 (1950).

Law 88-108 and the Arkansas manning-level legislation—or that of any of the states which has enacted, or which might now enact, manning-level legislation, unless it happened entirely to parallel the Awards. Moreover, the decisions of this Court make it absolutely clear that a federal arbitration Award rendered in accordance with guidelines laid down by the Congress of the United States precludes the operation of state laws which are inconsistent with it.

B. The Arkansas Laws May Not Be Sustained Under Any "Local Health or Safety Regulation" Exception to the General Rule of Supersession by the Federally-Sanctioned Agreement or Award.

On prior occasions, the Arkansas manning-level laws have been upheld against claims of conflict with the Commerce Clause or with the Railway Labor Act, on the ground that they amounted to permissible local safety regulations. See *Missouri Pac. R. Co.* v. *Norwood,* 283 U.S. 249, 255-56 (1931); *St. Louis, I. M. & Sou. R. Co.* v. *Arkansas,* 240 U.S. 518, 521 (1916); *Chicago, R. I. & Pac. R. Co.* v. *Arkansas,* 219 U.S. 453 (1911). And, to be sure, in *Teamsters Union* v. *Oliver,* 358 U.S. 283, 297 (1959), this Court indicated that a "local health or safety regulation" might, under some circumstances, be upheld despite a conflict with a collective bargaining contract which federal law empowered labor and management to make.

1. This sort of exception from the rule that a state statute must bow to a federally-sanctioned collective bargaining agreement—or arbitration award—patently cannot be sustained in this case. We start with the fact that whatever might be thought to be the "safety" justification of the manning-level laws, they clearly are totally different

from the normal sort of industrial health or safety laws which deal with such subjects as safety equipment, provision of protective clothing, factory ventilation, washroom conditions and so forth.[10] On their face, they are quite different from the legislation recited by the appellant brotherhoods requiring the sounding of bells or whistles at public crossings; requiring sanitary drinking cups and pure water in locomotives and cabooses; and providing for such matters as "candle power of headlights, construction of cabooses, lights on switches, signals at tunnels and first aid kits." (Appts. Br. No. 69, p. 8)

In striking contrast with these statutes, the unvarnished fact of the matter is that the Arkansas "crew consist" laws are laws guaranteeing a specified arbitrary number of jobs on each operating train "regardless of any modern equipment." They may be thought to have some safety aspects —though of course in modern railroading they are unrealistic in terms of safety—but predominantly they are "full employment" legislation,[11] directly regulating what

---

[10] Listing the sort of permissible state health and safety laws in *Terminal R.R. Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943), this Court specifically mentioned: "sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection."

[11] See Lecht, *Experience Under Railway Legislation* (1955), pp. 93-94: "Trainmen and firemen assumed the lead in pushing full-crew bills because unemployment was particularly severe among their members."

Slichter, *Union Policies and Industrial Management* (1941), p. 187:

> "One of the most ambitious efforts to make work by requiring excessive crews, or the employment of unnecessary men, is being made (with great success) by the train service unions on the railroads. These unions have been spurred to require the employment of unneeded men by the great drop in the employment of train service employees. The train service unions have used three principal methods to make work: (1)

has been for many years the central labor-management problem in the railroad industry: the problem of the number of jobs to be provided on each train.[12] The laws thus seek—as did the state antitrust statute in *Oliver*—"specifically to adjust relationships in the world of commerce." *Teamsters Union* v. *Oliver*, 358 U.S., at 297. As the *Oliver*

---

support of legislation, either requiring full crews or limiting the length of trains; (2) retaining obsolete rules which make work; and (3) enforcing the interpretations of rules so as to make work and to penalize the roads for using economical methods of operation."

Twenty years later, at about the time the national manning-level crisis began, the same author considered the situation unchanged:

"Although there are an almost indefinite number of make-work methods, the following eleven varieties include most of the make-work practices: . . .

"*Requirement of Excessive Crews.* The railroad crafts have made a few attempts to negotiate excessive crew requirements, but they have relied chiefly on legislation. They have sought two types of laws—full-crew laws and train limit laws."

[The authors proceed to explain that the latter laws have been declared unconstitutional, but that the manning-level legislation then remained in effect.] Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960), pp. 318, 322-23.

See also Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 249-50 (1962).

[12] Indeed, the motion to intervene filed by the brotherhoods in the district court makes it perfectly plain that the primary interests of the brotherhoods in the Arkansas legislation lies in the economic benefits received by the brotherhoods and their membership from the existence of those laws. The first two recitals of the brotherhoods' interest in the lawsuit are most revealing:

"The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in their capacity as agents and spokesmen for their members in that it would result in the loss of employment of large numbers of such members whose jobs are protected by the statutes being challenged.

"The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in that it would result in a large loss of organizational membership and

case and other decisions of this Court[13] teach, it is not necessary for a state statute to be expressly labeled as part of the state's Labor-Management Code—or even to be primarily directed at the labor-management relationship—for the superseding force of the federal labor-management law to have its effect on it. Accordingly, the elaborate argument of the appellant brotherhoods, derived from the place in which the Arkansas Act is codified, and from the nature of its neighbors in the statute books, misses the point. (Appts. Br. No. 69, pp. 8-9)[14]

Indeed, it would be hard to find statutes more plainly directed at the core of labor-management economic problems than the Arkansas statutes. Those statutes frontally

---

income because of the loss of employment of large numbers of their members whose jobs are protected by the statutes being challenged." (R. 25)

[13] See *Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951) (public utility law); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955) (antitrust law); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963) (public utility seizure law).

[14] Indeed, the Supreme Court of Arkansas has not accepted the legislation in question as being simply a regulation of safety. In *Johnson* v. *Hall*, 229 Ark. 400, 316 S.W.2d 194 (1958), the railroad brotherhoods were seeking to require the Arkansas Secretary of State to accept the terms of a ballot title of a proposed constitutional amendment which would, in essence, have enshrined the Acts in question in the State Constitution. Under Arkansas law, the ballot title of a proposal for popular vote may not contain partisan coloring. The brotherhoods' proposed ballot title for the constitutional amendment was "An Amendment Prohibiting Operation of Trains With Unsafe and Inadequate Crews." Despite the fact that the standards of the constitutional amendment were the same as those already contained in the state crew-manning level laws, the Arkansas Supreme Court unanimously rejected the brotherhoods' contention that the proposed title was fair and nonpartisan. The court commented, as to the question of the adequacy of crew manning levels in terms of safety: "Actually, this is a fact question, depending upon the circumstances in each case." 229 Ark., at 403, 316 S.W.2d, at 196.

attack, as far as the railroad industry is concerned, the basic nationwide labor-management relations problem: the question of how far the introduction of modern equipment and automatic devices will be allowed to have its natural effect of reducing employment in certain obsolete job categories.[15] *Cf. Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 335-41 (1960). Unlike matters of factory ventilation and sanitation, the safety aspects of this question are completely intertwined with

---

[15] As the opinion of the neutral members of the Board, R. 128; 41 Lab. Arb., at 693-94, stated:

> "[T]he size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

The approach the President took to these questions in proposing the legislation is clear:

> "Yet we cannot stop progress in technology or arrest economic change in transportation or any other industry—nor would we want to. For technological change has increased man's knowledge, income, convenience, leisure, and comfort. It has reinforced this Nation's leadership in scientific, economic, educational, and military endeavors. It has saved lives as well as money, and enriched society as well as business. Our task as a nation, to use the phrase of the Commission report, is simply to make sure that this public blessing is not a private curse. We cannot pretend that these changes will not occur, that some displacement will not result or that we are incapable of adapting our legislative tools to meet this problem." (R. 51)

the basic economic questions.—Indeed, the discriminatory nature of the Arkansas laws, which we develop in Part III, strongly suggests that their safety aspects are minimal.

2. In itself, this would be an adequate reason for concluding that these laws are not within the "local health or safety regulation" exception to the rule of supersession. But there is a further answer to the claim that, as purported safety regulations, these laws can stand despite their conflict with the arbitration Award. That answer is found in Section 7 of Public Law 88-108. There, the Arbitration Board was given as its first guideline in making its Award the command to give "due consideration to the effect of the proposed award upon adequate and safe transportation service." Congress, in providing an arbitrated solution to the economic problems involved in the crew level question on the nation's railroads, ordained that any safety questions involved should be taken into account. Thus—for the first time—a federal standard for railroad crew manning levels has been established; a standard which has been provided for by Congress from the point of view of safety as well as the other relevant considerations.

The legislative history of Public Law 88-108 shows conclusively that Congress recognized from the outset that the safety aspects of the matter were of federal concern, and that Congress fully intended to require any arbitration board it created to give extensive consideration to the question of safety. The studies on which Congress relied in passing the bill had thoroughly canvassed all safety questions. After completing a comprehensive year-long study of the problem, the Presidential Railroad Commission—which recognized that its recommendations were contrary to the state laws—stated:

> "The basic considerations which have governed our thinking in formulating recommendations have been that the Nation is entitled to a safe and efficient rail-transport system, . . . that employees are entitled to work . . . under conditions which promote efficiency, safety, and security. . . ." [16]

Agencies subsequently created in an effort to resolve the dispute also gave painstaking treatment to the effect of proposed crew consist changes on the safety of railroad employees and the public.[17]

It is thus far from happenstance that the original bill proposed by President Kennedy required, in the event of arbitration, that "due consideration [be given] to the effect of the proposed rule upon adequate and safe transportation service to the public and . . . to the recommendations of the Presidential Railroad Commission and Emergency Board 154." Sections 3, 6. (R. 53-54) In his message to Congress, the President stressed that "an expert body should pass on these proposed rule changes in the light of public service and safety . . . I recommend that . . . the [Interstate Commerce] Commission judge the effect of each proposed rule on the adequacy and safety of transportation." (R. 48)[18]

---

[16] Pres. Comm'n Rep., p. 9. Moreover, it seems indisputable that the Commission made good its promise: each issue presented to that body was assessed in terms of its impact on safety. See Pres. Comm'n Rep., pp. 35-50; 53-64; see also, pp. 189-226, 237-46, 266-67 (dissenting opinions).

[17] See Report to the President by Emergency Board No. 154, incorporated in House Hearings, pp. 43, 45-46, 47; Report to the President by the Special Subcommittee of the President's Advisory Committee on Labor-Management Policy, in House Hearings, pp. 14-15.

[18] The Administration bill and the President's accompanying message are also incorporated in Hearings before the Senate Com-

Along with its consideration of the previous reports dealing extensively with the safety issue, Congress—realizing that an arbitrated solution would clearly cause a reduction in then-existing train manning levels—also undertook an independent examination of the effect of the proposed legislation on the safety of railroad transportation. The hearings contain extensive discussions of this topic by union and management representatives, as well as by officials of the Department of Labor and members of Congress themselves.[19] The House Report and the debates on the floor of Congress also include numerous indications of Congress' concern with safety.[20]

---

mittee on Commerce on S.J. Res. 102, 88th Cong., 1st Sess. (1963), p. 1 (hereinafter referred to as "Senate Hearings"), and in House Hearings, pp. 1, 6.

[19] See Senate Hearings, pp. 72, 85-86, 98, 99, 100, 429, 482-88, 491-98, 501, 504-05, 528, 530, 536, 630-34, 709-12; House Hearings, pp. 50, 107-08, 111, 618, 647, 706-23, 738-67, 803-04, 805, 815-16, 820, 996-99.

For example, the following question was asked Secretary of Labor Wirtz by Representative Harris, Chairman of the House Committee considering the proposed legislation:

> "THE CHAIRMAN: In section 3 . . . you would provide that the [Interstate Commerce] Commission shall consider the effect of the proposed rule upon adequate and safe transportation service to the public.
>
> "In looking over section 5(2)(c) of the Interstate Commerce Act it includes only adequate service . . . You have therefore added 'safe' . . . as another consideration?
>
> "SECRETARY WIRTZ: That is correct."

House Hearings, p. 50.

[20] See H.R. Rep. No. 713, 88th Cong., 1st Sess. (1963), pp. 9, 21-22, 24-25 (hereinafter referred to as "H.R. Rep."); 109 Cong. Rec. 15903, 15962, 16127, 16128, 16141-42 (1963).

"[W]e have train crews all over the country—passenger trains, freight trains, freight yards, short lines, main lines—all of these various services which require negotiation as to what is needed insofar as adequacy of service and safety of service, the burden of work." 109 Cong. Rec. 16128 (Remarks of Congressman Harris).

The end result was Section 7(a)'s directive to the arbitration board to give full—indeed primary—consideration to the safety aspects of the controversy. The national arbitration Board faithfully carried out this mandate. The Award itself stated: "The Board has given due consideration to the effect of the Award upon adequate and safe transportation to the public . . ." (R. 82; 41 Lab. Arb., at 674)

The Board's action on the fireman question is illustrative of its consideration of the safety aspect. The Board made seven basic findings (R. 114-115; 41 Lab. Arb., at 687-88) on the fireman question. Five of these findings are directly related to safety questions. Typical of these findings are the following:

> "In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members.
>
> "A considerable portion of the mechanical duties now performed by the fireman is not absolutely essential to the safety and efficiency of road freight and yard operations. . . .
>
> "In yard service the normal lack of a third man in the cab is offset in part by the reduced speed of the locomotive, and will be offset still further by installing a dead-man control in all yard engines, which our award requires as a condition precedent to the operation of such locomotives without a fireman . . .
>
> "[W]e agree with the [Presidential] Commission 'that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that

there should continue to be either a national rule or local rules requiring their assignment on all such diesels.'" (R. 114-15; 41 Lab. Arb., at 687-88)

Moreover, after determining that 90 percent of the firemen's positions could be eliminated without impairing railroad safety, the Board set up a procedure for ascertaining the actual positions to be abolished, based exclusively "upon considerations of safety, undue work burden, and adequate and safe transportation service to the public." (Award, para. II B(1), (2), R. 83; 41 Lab. Arb., at 675)

This concern with safety also permeated the guidelines which the national Board imposed on the local Boards for the resolution of the remaining manning-level questions, which we have set out at pp. 12-13, *supra*. The national Board's guidelines are clear and definite; the first was "assurance of adequate safety," and virtually all of the remaining ones were obviously related to that goal. (Award, para. III C, R. 92; 41 Lab. Arb., at 679)

The opinion of the neutral members of the Board thus gives an accurate summary of the Board's approach when it points out: "It may fairly be stated that concern with safety has pervaded this entire proceeding." (R. 116; 41 Lab. Arb., at 688) This opinion proceeds to assess each of the Board's conclusions with regard to crew size in terms of its potential effects upon the safety of railroad workers and the public. See R. 112, 113-24, 128-35; 41 Lab. Arb., at 686, 687-92, 693-97.

Indeed, when called on recently to testify before the Senate Committee on Commerce concerning the Board's implementation of Public Law 88-108, the Chairman of the Arbitration Board once again stressed the careful attention

the Board had given to all aspects of the safety question. In addition to quoting extensively from the opinion of the neutral members on this topic, the Chairman stated:

> "The point I want to emphasize is that we spent a great deal of effort, heard a tremendous amount of testimony and came to as honest a conclusion as we could about the safety factor as a preliminary to reaching our final Award. And in so doing, we made it explicit that the question of the ability of the carriers to pay did not affect our decision as to the need for firemen."[21]

---

[21] Hearings before the Senate Committee on Commerce on the Administration of Public Law 88-108, 89th Cong., 1st Sess. (Aug. 2-Sept. 28, 1965), Tr. pp. 844-45 (hereinafter referred to as "1965 Senate Hearings") (the Hearings are not yet reported in printed form).

Additional evidence presented at the 1965 Senate Hearings shows clearly that the Board's assessment of safety issues was in fact correct. With regard to a charge by one of the brotherhoods that the elimination of firemen pursuant to the Award had resulted in a "deterioration of railroad safety," Senator Lausche placed in the record a letter from the Chairman of the Interstate Commerce Commission stating that "since implementation of Public Law 88-108 by the railroads, the Commission has investigated no accident . . . in which it was found that the absence of a fireman was a contributing or the proximate cause." 1965 Senate Hearings, Tr. pp. 4, 13. See also *id.*, Tr. p. 692 (testimony of the Chairman of the Interstate Commerce Commission to the same effect).

Still more significantly, the head of the Brotherhood of Locomotive Engineers, a union whose members would be directly affected by any purported lack of safety resulting from elimination of firemen, pointed out in a letter to the Committee:

> "[Our] engineers report that the Award as applied has not adversely affected either the employees or rail service in general. The engineer's responsibilities without a fireman are just the same as they were with one. . . . In short, engineers are now efficiently and safely moving their trains over the road."

1965 Senate Hearings, Tr. pp. 14, 18.

The conclusion is inescapable that Congress here took in hand the entire problem of crew levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the question. It authorized and directed its creature, the Arbitration Board, to make an award dispositive of the whole question, and the Board has done so.[22]

• • • • •

Here Congress has provided, in the most explicit terms in Section 7(a) of the Act, for a public review of all the relevant safety questions. Thus, there is no gap—which a local safety regulation might conceivably fill—in the federal scheme. Accordingly, the narrow "safety" justification under which these crew consist laws have been upheld in the past can no longer stand. Once Congress has entrusted the question of safety as affected by crew levels on the trains operated by interstate carriers to the Arbitration Board, inconsistent state regulation of crew levels could no more stand as a regulation of safety than it could as a frank, undiluted economic regulation of a matter for which the parties through a collective bargaining contract, or a compulsory arbitration board, had provided a solution.

---

[22] It is clear that whenever Congress or one of its agencies has established rules comprehensively treating a particular safety question, any state laws purporting to regulate the same subject matter must, under the Supremacy Clause, be set aside. *E.g., New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917); *Southern R. Co.* v. *Railroad Comm'n*, 236 U.S. 439, 446-48 (1915). "[W]hen the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them." *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569 (1919). Supersession is therefore undoubtedly called for in this case, where the challenged state legislation does not merely supplement but is in direct conflict with the Award.

C. The Legislative History of Public Law 88-108 is Consistent with Supersession of State Manning-Level Laws.

Appellants claim that the legislative history of Public Law 88-108 indicates that the Congress did not intend that state manning-level laws be superseded by the arbitration Award.—The fact of the matter is, rather, as the district court observed, that: "If any rational conclusion can be drawn from a legislative history on the question . . . it is that the Congress intentionally elected not to include a saving provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis." R. 266; 239 F. Supp., at 23.[23]

The appellants primarily rely on certain statements of Secretary of Labor Wirtz during the hearings on the bill, remarks made on the floor of the House of Representatives, and a passage in the House Committee Report. All these items are conclusory statements as to legal effect. Many are in the nature of predictions as to what the courts might hold. Most relate not to the final form of Public Law 88-108, with its provisions for compulsory arbitration within the procedural framework of the Railway Labor Act—an approach which was developed in the Senate—but to the administration's proposal for ICC action.

---

[23] Indeed, as the district court correctly held (R. 266-67, 239 F.Supp., at 23), there is no real basis for an examination of the legislative history in this matter. Congress here plainly said that the Award was to "constitute a complete and final disposition of the . . . issues" (§3, Public Law 88-108), and nothing in the text of the Act leaves room for any exceptions on a state-by-state basis. In the light of this plain expression—and of the undisputed purpose of the Act of solving a nationwide problem—the decisions of this Court teach that there is no reason to resort to the legislative history. See *Ex parte Collett*, 337 U.S. 55, 61 (1949); *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 492 (1947). See also *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 160, 166 (1958).

The excerpts relied on by appellants are not controlling for two reasons:

1. The essential source of the "legislative history" of an enactment like Public Law 88-108, in terms of its effect on state laws, lies not in predictions by witnesses in Congressional hearings or by Congressmen as to what the holdings of the courts might be, or even as to their conclusions as to the legal effect of the legislation. The real source of the relevant legislative history of Public Law 88-108 lies in the nature of the problem which Congress was attempting to solve; the means by which it chose to solve it; and the interests which Congress sought to serve through the passage of the legislation. In the decisions of this Court in the complex field of the supremacy of Federal labor-management legislation, it has classically been considerations of this nature, rather than characterizations of Congressmen as to possible legal effect, which have been the dominant factors in an investigation of the legislative purpose. See, *e.g., San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 239-45 (1959); *Teamsters Union* v. *Oliver,* 358 U.S. 283, 295-96 (1959); *California* v. *Taylor,* 353 U.S. 553, 565-67 (1957); *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468, 480-81 (1955); *Garner* v. *Teamsters Union,* 346 U.S. 485, 488-91 (1953); *United Automobile Workers* v. *O'Brien,* 339 U.S. 454, 456-58 (1950); *Hill* v. *Florida,* 325 U.S. 538, 541-43 (1945).

As we have developed, the problem with which Congress was dealing was—as major labor problems in the railroad industry are apt to be—a nationwide problem. The Presidential Commission which had studied the problem and reported the preceding year indicated that a national solution was required and that some technique should be adopted to insure a national solution regardless of the

state manning-level laws.[24] The subsequent studies of the problem also treat it as one of national concern.[25]

Moreover, all of the legislative history—both in terms of the antecedents of the legislation and in terms of the proceedings in Congress—bespeaks a concern with the safety aspects of the manning-level controversy. The Act as passed requires the safety aspects to be taken into account. The legislative history thus clearly indicates the purpose of Congress to deal with the very thing which is the only conceivable justification for the continued constitutionality of the statutes—the safety question.[26]

It is apparent that Congress, in the process of enacting this emergency legislation, did not deliberate meaningfully

---

[24] The Presidential Commission clearly felt that its recommendations for the reduction of railroad manning levels "should have nationwide application," and should not be distorted by contrary state full crew laws which "apparently fail to envision modern railroad operations." It recognized, however, that it was an advisory body, and that elimination of restrictive state legislation was beyond its power. Pres. Comm'n Rep., pp. 63-64.

[25] In its Report to the President, Emergency Board No. 154 fully realized that the work rules controversy was a nationwide problem requiring a uniform nationwide solution. Accordingly, the Board recommended "a national rule . . . establishing a procedure for ascertaining those situations, if any, which will continue to require the presence of a fireman." See Report to the President by Emergency Board No. 154, in House Hearings, p. 45. Similarly, although the Board suggested that the other crew consist issues be settled through local negotiations, it recommended that such negotiations be conducted pursuant to nationally established guidelines. *Id.*, at 47.

In his message accompanying the proposed legislation, President Kennedy also pointed out that "this dispute over railroad work rules is part of a much broader national problem [of automation]." (R. 50; House Hearings, p. 11; Senate Hearings, p. 11)

[26] See *Missouri Pac. R. Co.* v. *Norwood*, 283 U.S. 249, 255 (1931); *Chicago, R. I. & Pac. R. Co.* v. *Arkansas*, 86 Ark. 412, 434-35, 111 S.W. 456, 465 (1908), *aff'd*, 219 U.S. 453 (1911); *St. Louis, I. M. & Sou. R. Co.* v. *Arkansas*, 114 Ark. 486, 170 S.W. 580 (1914), *aff'd*, 240 U.S. 518 (1916).

over questions of a collateral and technical nature, such as the effects of the proposed bill in the minority of states which had manning-level legislation. On the other hand, Congress could and did take into account the general interests sought to be served by the bill—the resolution of the controversy so as to avoid a debilitating national rail strike, the maintenance of safe conditions in the railroad industry, and the placing of the resolution of the controversy solidly within the general framework of the Railway Labor Act. These essential issues were considered fully and adequately—as was the policy decision to forego, in this instance, the general policy of the federal labor laws favoring a voluntary solution of labor disputes, rather than compulsory arbitration.[27] But, notwithstanding appellants' random quotations on pree[illegible]dion scattered throughout the legislative history, it is clear that the peripheral question of preemption of state law was at most afforded only a passing and inconclusive consideration.

2. Moreover, even on the level of "legislative history" on which appellants' briefs move, there is no case demon-

[27] Appellants make much of the references, primarily in the Senate Hearings and Senate Report, to the reluctance of Congress to pass the legislation in question, and its desire to make it "just as temporary and just as limited as possible." (Appts. Br. No. 69, pp. 29-31) See also S. Rep. No. 459, 88th Cong., 1st Sess. (1963), pp. 7, 9-10 (hereinafter referred to as "S. Rep."). But these remarks do not tell us anything about supersession of state legislation, which is what appellants suggest they are relevant to. What they were, in fact, related to was the serious question of making an exception to the established national policy of collectively bargained solutions to labor disputes, in favor of a compulsory arbitration solution. Congress wanted to make sure that this remedy was to be applied simply to the dispute before it, and that Congress' action would not serve as a precedent for the resolution of other disputes. See S. Rep., p. 7. However, the legislation makes it perfectly clear that as to the fireman and other manning-level controversies involved in the dispute, the Award was to "constitute a

strated for any intention of Congress that the state laws should not be preempted. Indeed, it appears that it was repeatedly suggested to Congress that if it wished to avoid preemption it should include an express saving clause in the Act—as has been included in various acts of Congress regulating commerce.[28] Congress did not do so, although, as the district court pointed out, "the bill was amended in many other respects after the hearings before both Committees had been concluded." (R. 266; 239 F.Supp., at 23)

To turn to the specifics of the instances cited by appellants:

(a) To be sure, Congressman Harris stated on the floor of the House that he did not believe state laws would be affected by the bill, and the Report of the House Committee on Interstate and Foreign Commerce, of which he was Chairman, reflected his view. (H.R. Rep., p. 14) But the Senate Committee Report was pointedly silent on the question, and its silence is significant in view of the fact that the final form of the legislation was developed in the Senate. See *Steiner* v. *Mitchell*, 350 U.S. 247, 254 (1956).—Most importantly, when Congressman Harris stated his conclusion on the floor of the House, he was immediately challenged by Congressman Smith, Chairman of the Rules

---

complete and final disposition" of the issues. (§ 3, Public Law 88-108)

[28] See Securities Act of 1933, §326, 53 Stat. 1177, 15 U.S.C. §77zzz; Securities Exchange Act of 1934, §28, 48 Stat. 903, 15 U.S.C. §78bb(a); Public Utility Holding Company Act of 1935, §21, 49 Stat. 834, 15 U.S.C. §79u; Investment Company Act of 1940, §50, 54 Stat. 846, 15 U.S.C. §80a-49; Federal Power Act, §27, 41 Stat. 1077, 16 U.S.C. §821; Communications Act of 1934, §221(a), (b), 48 Stat. 1080, 47 U.S.C. §221(a), (b); Part II of the Interstate Commerce Act, §202(c), 49 Stat. 543, 49 U.S.C. §302(b). *Cf. Garner* v. *Teamsters Union*, 346 U.S. 485, 501 (1953).

Committee, which had also considered the bill."[9] In the light of this strong contradiction of views, it is clearly impossible to ascribe Congressman Harris' interpretation of the bill's effect even to the House of Representatives. *Cf. FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

The brotherhoods seek to impugn Congressman Smith's important pronouncement on the supersession issue, contending that it was based on the "discredited" theory "that states cannot affect interstate commerce because of the commerce clause of the federal Constitution." Appts. Br. No. 69, p. 20.

Even a cursory reading of Congressman Smith's remarks reveals otherwise. He was not delivering a lecture on the effect of the Commerce Clause in the abstract. His statement was made in the course of a debate on the floor of the House concerning the advisability of a particular federal statute regulating an aspect of interstate commerce—the legislation which became Public Law 88-108. In this context, what Congressman Smith was clearly say-

---

[9] "MR. SMITH OF VIRGINIA. Mr. Speaker, the colloquy between the gentleman from California [Mr. Sisk], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. Harris], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

"I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

(*footnote continued on next page*)

ing was that if Congress did take action in this area (as it was about to do), the legislation thus passed would, under the Commerce Clause and the Supremacy Clause, override inconsistent state laws, such as the "full crew" laws.

(b) The other principal expression of "intention" relied on by appellants is the opinion of Secretary of Labor Wirtz that the administration-proposed legislation[30] would not preempt state laws. (Appts. Br. No. 69, p. 16) Indeed, most of the other expressions of "intention" referred to by appellants seem to be remarks of other witnesses or Congressmen simply quoting what Mr. Wirtz' opinion was. (Appts. Br. No. 69, pp. 18-19; 22)

But the fact of the matter is that shortly after Secretary Wirtz gave his opinion, he was challenged by several Congressmen who expressed a degree of incredulity as to his view:

"MR. EDMONDSON. Mr. Speaker, will the gentleman yield?

"MR. SMITH OF VIRGINIA. I yield to the gentleman from Oklahoma.

"MR. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

"MR. SMITH OF VIRGINIA. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce." (109 Cong. Rec. 16122 (1963)).

[30] In a recent letter to the Senate Committee on Commerce, Secretary Wirtz was pointedly noncommital on the issue of the effect of the legislation in the form finally passed, on state laws: "The . . . letter [of one of the brotherhoods] also raises certain questions with respect to the application of Public Law 88-108 to State Full Crew laws. In view of the nature of this problem, and the state of current litigation on this matter, I would prefer to refrain from any comment." 1965 Senate Hearings, Tr. p. 7.

"MR. SIBAL: . . . Do I understand that it is your position that this bill would not supersede the States' full-crew laws?

"SECRETARY WIRTZ: Yes, sir.

"MR. SIBAL: And has a thorough job of legal research been done on this?

"SECRETARY WIRTZ: I indicated in my answer to a similar question earlier that the answer to the question of whether there is thorough research, the answer is 'no.'" (House Hearings, p. 111)

After a certain amount of further colloquy, Secretary Wirtz agreed to supply for the record a legal memorandum on the point.—Entirely contrary to the position taken by Secretary Wirtz at the hearing, the point of the legal memorandum was that it was quite possible for an ICC-promulgated interim work rule, under the administration bill, to supersede inconsistent state legislation! (House Hearings, pp. 112-13)[21]

* * * * *

Indeed, the most telling aspects of the legislative history, even on this level, support the judgment below. Incidental remarks in the legislative history are not as significant as what Congress did and what it consciously left undone. It made a conscious choice not to include a saving clause for state laws.

During the hearings on the bill proposed by the President, which would have assigned to the Interstate Com-

[21] The memorandum in fact pointed out that the legislation would "appear to authorize the ICC to approve an interim work rule subject to the condition that it would not be applicable in any state where the law required otherwise" and that that technique could be followed to avoid supersession. (House Hearings, p. 112)

merce Commission similar responsibilities to those delegated under Public Law 88-108 to the Board, representatives of the Government several times brought to the attention of the House Committee that the bill did not contain a provision that would avert preemption of state crew consist laws, and that if the Congress did not intend such preemption a saving clause should be included.[32] De-

---

[32] "THE CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?

"SECRETARY WIRTZ. I would want to answer subject to check, but I think not.

"THE CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

"SECRETARY WIRTZ. That is correct.

"THE CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

"SECRETARY WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

"THE CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

"SECRETARY WIRTZ. I would respect your views, sir, completely on it."

(House Hearings, p. 111)

The question was again raised during testimony before the same committee by Mr. Robert W. Ginnane, General Counsel of the Interstate Commerce Commission, who analyzed the effect of the bill as then drawn on the state crew consist laws:

"MR. GINNANE. . . . It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across State crew laws. I understand that the Secretary of Labor has testified here that that was not an intended result.

"THE CHAIRMAN. That is true.

"MR. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

"THE CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what is intended

spite these references, as we have noted, no such saving clause was introduced, although the bill was repeatedly amended not only after the hearings but after the reports of the committees in each house.

Appellants attempt to negate the effect of these warnings by arguing that, instead of using a saving clause, Congress decided to employ an *ad hoc* arbitration board rather than the Interstate Commerce Commission in order to eliminate the possibility of preemption. (Appts. Br. No. 69, p. 22; Appts. Br. No. 71, p. 16) Since Congress could have clearly accomplished the same putative objective by simply inserting a saving clause, it seems a bit farfetched that Congress made a radical change in the method for settling the dispute for that reason.—And, to be sure, the legislative background of this major revision completely rebuts appellants' position. The substitution was made in the Senate, where the committee report states clearly that the reasons for doing so were (1) that Congress did not want to create a compulsory arbitration

---

and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed. I believe you have covered the other notations that I have made already and there is no need to go over them again."
(House Hearings, p. 614)

Mr. Ginnane also cautioned in testimony before the Senate Committee on Commerce that if the Congress did not intend to preempt state crew consist laws, then an expression of intent to preserve the state laws should be included in the bill.

"Mr. Ginnane. . . . I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

"If it desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase which would exclude paragraph 11 of Section 5 of the Interstate Commerce Act."
(Senate Hearings, pp. 400-01)

precedent for the entire transportation industry; (2) that the brotherhoods lacked confidence in the Interstate Commerce Commission;[33] and (3) that that agency was already overburdened with work. S. Rep., pp. 8-9. Since Congress could easily have prevented preemption by adding a saving clause, but apparently chose not to do so, the legislative history hardly supports appellants' position.[34]

* * * * *

---

[33] Appellants imply that the reason the brotherhoods opposed arbitration by the Interstate Commerce Commission was to make certain that the state full crew laws would not be preempted. The record shows, however, that the real reasons for such opposition were that the brotherhoods had considerable doubt about the Commission's competency in this area, and still graver doubts as to its impartiality. Those were the arguments repeatedly asserted by union representatives, and relied upon by the Senate, which introduced this major revision of the legislation. See Senate Hearings, pp. 430, 432, 450-51, 469, 470-72, 490, 513-14, 581-82, 588-89, 600, 615-16, 618, 624-28, 630-33, 656-57; House Hearings, pp. 620, 621, 638-39, 649, 658, 674-75, 701, 703, 771, 796, 903, 933-34, 938, 990-94, 996-99, 1019-20.

[34] There is some suggestion in the brief for appellant brotherhoods that the only source of possible preemption in the proposals considered by Congress was the reference in the administration's proposal to § 5 of the Interstate Commerce Act, in that paragraph 11 of § 5 specifically allows the ICC to authorize the consummation of transactions approved by it under § 5 of the Act, contrary provisions of state law notwithstanding. (Appts. Br. No. 69, pp. 21-22) This express provision of § 5 is necessary since the Commission's approval powers under § 5 extend to a variety of subjects—such as mergers, the entry of foreign corporations into a state, etc.—which are generally considered to be peculiarly matters of state law. But certainly, when the context of the mechanics for the resolution of the rail dispute was changed from the Interstate Commerce Act to the Railway Labor Act by the Senate version of the legislation, the need for an express saving clause if supersession of state laws was not to follow was hardly obviated. For there are scores of cases teaching the preemptive effect of the basic Federal labor relations statutes—the National Labor Relations Act and the Railway Labor Act—on state legislation dealing with aspects of the labor-management relationship. Certainly it was still incumbent on Congress to add a saving clause, as was suggested on several occasions before Congress, if the normal effect of the legislation was to be averted.

In sum, the classic tests of legislative intent and purpose in this area—the background of the statute, the nature of the problem being dealt with, and the factors being resolved by the legislation—all unite, against the backdrop of this Court's decisions as to the effect of federal labor legislation, to support the conclusion that the compulsory arbitration law and the Awards rendered under it supersede inconsistent state legislation. Stray conclusionary remarks in the legislative history—many directed at a rejected form of the legislation—cannot indicate a contrary result, particularly in view of the failure of Congress affirmatively to respond to the repeated suggestion to it that a saving clause be inserted in the Act.[35]

---

[35] Similarly, appellants place great emphasis on the remark in the opinion of the neutral members of Arbitration Board No. 282 that the Award would not cause immediate severe economic dislocations because of the existence of state full-crew legislation. (R. 121; 41 Lab. Arb., at 690) In the first place, it must be remembered that this statement in the opinion was only in the context of a recital of a number of reasons why the individual carriers would not be able *"immediately* to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews . . ." (*Ibid.;* emphasis supplied) The opinion, then, was concerned with what the "immediate" effects would be; and quite obviously, because of the necessity either of obtaining judicial declarations of the supersession of the state laws, or of obtaining their repeal, the "immediate" effect of the state laws would be, as a practical matter, to require the retention of firemen.

In any event, the question of preemption of state law was at most peripheral to the Board's duties and could hardly have been given meaningful consideration. What the Board did here—that is, the actual terms of its Award—is of considerably greater significance than the discussion in its opinion. The opinion itself reflects this; it expressly provided that in the event of any conflict between the opinion and the Award "the latter is, of course, intended to govern." (R. 99; 41 Lab. Arb., at 681)

Indeed, an affirmative view of the Board's concept of its own powers with respect to state legislation is obtained from a reading of its discussion of the other crew consist issues. In supporting its decision to leave the resolution of these issues to the local Boards, the National Board observed that: "The consist of these crews, involving primarily helpers and road brakemen, has been deter-

D. Public Law 88-108 Permanently Supersedes the Arkansas Laws.

The two-year period provided by Section 4 of Public Law 88-108 during which the Award "shall continue in force" expires on January 25, 1966, as to the provisions relating to crew members, and on March 31, 1966, as to the

---

mined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions." (R. 128; 41 Lab. Arb., at 693) The Board's Opinion does not indicate that any of these sources of regulation is to be viewed in a different light from any of the others, and delegates the entire problem to the local Special Boards of Adjustment. State and local regulation, according to the guidelines in the Award, were simply a factor to be considered. (Award, para. III C(2)(i), R. 93; 41 Lab. Arb., at 679)

A similarly affirmative view of the Board's concept of its own powers may be derived from a supplemental opinion rendered by it, answering certain questions put by the parties to the Award, dated May 17, 1964, and filed in the United States District Court for the District of Columbia. *In re Certain Carriers*, Dkt. Misc. No. 41-63. There, in response to a complaint of the carriers that the brotherhoods were refusing to go through the procedure of exercising their 10% "veto," that is, their right to designate which 10% of the firemen's positions would be retained, insofar as "full crew law states" were concerned, the Board declared:

> "The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award [R. 83-84] are the same in the so-called 'full crew law states' as in all other states."

While the question put to the Board was in the context of repeal or amendment of the state laws, the Board's answer does not appear to be so limited.

The fairest conclusion that can be drawn from the statements in the Award, the opinion of the neutral members, and the supplemental opinion, is that the Board was not taking any position on the effect of its Award on the state laws. This is precisely the view taken by the Chairman of the Arbitration Board in his 1965 testimony before the Senate Committee on Commerce:

> "[T]here is the question of the effect of the Joint Resolution and the Award on the state full crew laws. As a Board, we have taken no position on this question. In answer to questions, we have held that the obligations and rights of the parties . . .

provisions relating to firemen. Thereafter, the terms fixed by the Award will be subject to change in the manner set forth in the Railway Labor Act, but will govern the relationships of the parties until so changed.

The District Court held that Public Law 88-108, together with the Award rendered under it, preempted the Arkansas laws permanently, thereby rejecting the contention of the appellants that whatever might be the situation during the two-year period specified in the Award pursuant to Section 4, thereafter those laws would again be operative. It is clear that the district court was correct, and that Public Law 88-108 preempts the state full-crew legislation not only during the present two-year period but permanently.

Congress cannot possibly have intended only a temporary supersession of the Arkansas laws.[26] First of all,

---

were the same in the so-called 'full crew' states as in all other states.

"But neither in that answer nor in any other interpretation have we purported to rule on the parties' obligations under state laws. This question, we believe, is for the courts to decide." (1965 Senate Hearings, Tr. pp. 878-79)

Clearly the local Special Board of Adjustment here was of the view that its powers extended to superseding state legislation. It obviously viewed its award as effective in Arkansas, even going so far as to prescribe that as to a certain specified Arkansas yard, the Paragould yard, no helpers whatsoever were to be required in switching operations—as opposed to the one helper generally required in its award, and the three helpers provided for by the state manning-level legislation of 1913. (R. 185; 42 Lab. Arb., at 921)

[26] Indeed, since the making of the Awards under Public Law 88-108, there has been a rapid trend to permanent repeal of the state laws; and a trend toward state court decisions holding them inapplicable to diesels—which, of course, corresponds with the coverage of the federal Awards. Thus, the laws in Arizona, California, and North Dakota were repealed by initiative or referendum at the November, 1964, elections (Ariz. Rev. Stat. § 40-853 (1965 Supp.); Cal. Labor Code §§ 6900.1-6903 (Dec. 1964 Supp.); N.D.

Congress fully realized that, if it imposed compulsory arbitration on the parties, the effects of any award thus rendered would extend far beyond two years. From its study of the far-reaching recommendations of the Presidential Railroad Commission and Emergency Board No. 154, Congress was aware that there was no short-range manner in which to resolve the manning controversy that had embroiled railroad labor relations in this country for over a decade. See Kaufman, *Working Rules in the Railroad Industry,* 5 Lab. L. J. 819 (1954); see also 1965 Senate Hearings, Tr. pp. 714-20. The recommendations of both of these groups showed conclusively that any contemplated solutions would include provisions requiring the railroads to spend millions of dollars in severance payments over a period of many years.[37] The debates on the

---

Code §§ 49-13-09 through 49-13-13 (1965 Supp.)); and Mississippi's and Oregon's legislatures repealed their laws in 1964 and 1965 respectively. (Miss. Code § 7759-61 (1964 Supp.); Ore. Sess. Laws c. 462, § 1 (1965 Supp.)) The Texas courts have authoritatively held the Texas statute not to apply to diesels. *Texas* v. *Southern Pac. Co.,* 392 S.W.2d 497 (Tex. Civ. App. 1965) (alternative holding), *writ of error refused "no reversible error,"* Texas Supreme Court. The Nevada Supreme Court has held likewise. *Southern Pac. Co.* v. *Dickerson,* 397 P.2d 187 (Nev. 1964). A similar result has been reached by a trial court in Nebraska. *Nebraska* v. *Thurston,* Dkt. No. 2410, District Court, Jefferson County, January 19, 1965. The Nebraska statute was thereafter repealed, August 4, 1965.

There is litigation pending in most of the other states having train manning-level statutes of any significance. In Indiana, the Superior Court, Marion County, granted a temporary injunction against enforcement of that state's Acts on February 3, 1965. An appeal is pending in that state's Supreme Court, Dkt. No. 30733. For the litigation in New York and Wisconsin, see note 8, p. 30, *supra.*

[37] For example, Emergency Board No. 154 recommended that firemen (other than those recently employed) with less than ten years' seniority be removed only if they were guaranteed comparable positions at the same wage for five years. With regard to

floor of the House and Senate likewise indicate that Congress fully appreciated these consequences of the proposed legislation. See 109 Cong. Rec. 15966-67 (1963); see also 109 Cong. Rec. 15903, 16133 (1963). Thus, when Congress directed the Board to make a "complete and final disposition" (Public Law 88-108, § 3) of the fireman and crew consist issues, it knowingly authorized a long-range solution, not one which could be cast aside two years later by reactivation of the full crew laws of a number of states.

The appellants' contention is that because the Act provides that the Award will "continue in force" for two years from its effective date, the preemptive effect of the legislation ends then. There are two basic reasons why this contention amounts to little more than a play on words. The first proceeds from the unique nature of collective bargaining contracts under the Railway Labor Act—into the mold of which Congress chose to pour the provisions for compulsory arbitration. The second relates to the far-reaching character of the Award itself—a character which Congress indeed contemplated it would have.

1. The short of the matter is that even though the Award "continue[s] in force" *as an Award* under the Act for a specified two years,[38] under the Railway Labor Act its terms remain as the measure of the rights and duties of the parties until changed in the manner provided by that Act. The Award may cease to "continue in force" as an Award; but the terms it fixed remain in effect unless

---

certain categories of firemen whose positions were eliminated, the Presidential Railroad Commission proposed monthly allowances for a three-year period. See generally Report to the President by Emergency Board No. 154, in House Hearings, pp. 46-47; Pres. Comm'n Rep., pp. 48-50, 59-60.

[38] And, hence, as something which must remain in effect "unless the parties agree otherwise." Section 4, Public Law 88-108.

changed as provided by law. That this was to be the case is evidenced by the fact that Congress, rather than integrating the compulsory arbitration law into the Interstate Commerce Act, chose to integrate it into the Railway Labor Act. The preamble of Public Law 88-108 emphasizes Congress' basic desire to resolve the dispute "in a manner which preserves and prefers solutions reached through collective bargaining."[39] (R. 76) Congress was able to accomplish this objective by specifically incorporating the mechanics of the Railway Labor Act, thereby placing the Award securely within that framework.

While the administration had proposed that compulsory arbitration be conducted by the Interstate Commerce Commission (R. 48-49),[40] Public Law 88-108 referred the controversy to an *ad hoc* arbitration board very much like those created in the case of voluntary submissions to arbitration under Section 7 of the Railway Labor Act. (R. 76-78) Accordingly, Section 4 of Public Law 88-108 provided that, to the extent feasible, arbitration be conducted, and the award made and filed, pursuant to Sections 7-9 of the Railway Labor Act. Whereas the administration measure provided for "interim" rules (§ 1) to "remain operative" for two years (§ 4), Section 3 of Public Law 88-108 provided that the Award should be a "complete and final

---

[39] The legislative history of Public Law 88-108 demonstrates the tremendous importance which Congress attached to the resolution of this and future railroad labor disputes through collective bargaining. See House Hearings, pp. 39, 60, 65, 109, 174, 559; Senate Hearings, pp. 47, 50, 55, 62, 371, 412, 655-56; S. Rep., pp. 3, 7, 9, 10; H.R. Rep., p. 13.

[40] As has been noted at pp. 53-54, *supra*, Congress decided not to use the Interstate Commerce Commission because of its desire to avoid a compulsory arbitration precedent for the entire transportation industry, opposition of the brotherhoods to that agency, and the existing workload of the Interstate Commerce Commission.

disposition" of the issues referred to the Board; it also provided—in the language that Section 8(j) of the Railway Labor Act uses as to the duration of awards on arbitration submissions under that Act—that the Award "shall continue in force" for a period, as provided in the Award, not exceeding two years. Thus, the joint resolution "adopt[ed] the time-tested provisions of the Railway Labor Act" to Congress' purpose. S. Rep., p. 3; see also S. Rep., p. 11; H.R. Rep., p. 14.

What Public Law 88-108 did then was to take the place of an arbitration agreement under Section 7 of the Railway Labor Act. In the words of the district court which upheld the Award, it "supplant[ed] an agreement to arbitrate." *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 18 (D.D.C. 1964).—To be sure, unlike a traditional agreement to arbitrate, Section 7(a) of Public Law 88-108 imposed a specific requirement on the arbitrators to give due consideration to the effect of their Award on safety. But in all other respects, Congress directed the Board to render its Award pursuant to the terms of the Railway Labor Act.

The effect of keying Public Law 88-108 into the Railway Labor Act is clear. The entire framework of labor-management relations created by that Act negates the possibility of temporary supersession. Altogether unlike the case of employment terms and conditions in contracts negotiated under the National Labor Relations Act, the effect of employment terms and conditions provided for in agreements or arbitration awards in the railroad industry does not terminate on a fixed date. Instead, the Railway Labor Act requires that all terms of employment remain in effect at least until a notice of proposed changes has been given by one of the parties pursuant to Section 6 of the

Railway Labor Act. See also Section 2 Seventh.[41] Even after that notice has been submitted, the status of the parties may not be altered until the Mediation Board has concluded its services, which may, at times, be protracted.[42]

Thus, in the railroad industry even the terms of collective bargaining contracts providing for a fixed expiration date must continue in effect beyond that date, until changed as provided in the Railway Labor Act. *Manning* v. *American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964). By the same token, while arbitration awards, under Sections 7-9 of the Act, "continue in force" for the period agreed on by the parties in making their submission—and hence are not subject to change during that period—the terms they fix continue on the same basis as a collective bargaining contract thereafter—again, until changed in the method provided for in the Railway Labor Act.[43]

---

[41] See, *e.g.*, *Manning* v. *American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964); *Pullman Co.* v. *Order of Ry. Conductors*, 316 F.2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963).

[42] See *Brotherhood of Locomotive Engineers* v. *Morphy*, 109 F.2d 576 (2d Cir. 1940), and *Burke* v. *Morphy*, 109 F.2d 572 (2d Cir. 1940), *cert. denied*, 310 U.S. 635 (1940).

[43] Section 6 of the Railway Labor Act requires the parties to give "thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions." It is clear that the "agreements" referred to in Section 6 include agreements to arbitrate entered pursuant to Section 8 of the Act and the resulting arbitration awards. It would be illogical to treat the awards stemming from arbitration agreements differently from agreements reached through collective bargaining. In both cases, the terms of employment arrived at were intended to create a continuing status which could be revised only by taking the steps required by the Railway Labor Act. For that reason, the parties involved in the enactment of Public Law 88-108 considered that the arbitration Award rendered thereunder could only be modified according to the terms of the Railway Labor Act. See note 45, p. 63, *infra*.

The result is that the employer-employee relationship in the railroad industry is a unique blend of contract and status. The employment arrangement of the parties, whether created by contract or by arbitration as in the present case, is of a continuing nature.[44] The relationship remains in effect and may not be changed except as provided in the Railway Labor Act.

In enacting Public Law 88-108, Congress ordained that arbitration be conducted and that, as far as possible, the resulting Award be administered according to the terms of Sections 7, 8 and 9 of the Railway Labor Act. The unavoidable conclusion is that, like any other arbitration award or employment contract in the railroad industry, the Award rendered pursuant to Public Law 88-108 created a continuing status.[45]

---

[44] Indeed, any unilateral attempt by either party to modify that arrangement without following the statutory procedure may be enjoined, notwithstanding the provisions of the Norris-La Guardia Act. See, *e.g.*, *Manning* v. *American Airlines, Inc.*, *supra*, 329 F.2d, at 34; *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F.2d 226 (3d Cir. 1955).

[45] The legislative history indicates divergent views concerning the means by which that status could be changed. The Secretary of Labor believed that, if the parties had not fully resolved their dispute within the two-year period of the Award as such, the Section 6 notices given by them in 1959 and 1960 would remain in effect. See Senate Hearings, pp. 81-82. On the other hand, counsel for the Brotherhood of Locomotive Engineers considered that new Section 6 notices would have to be tendered at that time as a first step toward modification of the Award. See House Hearings, p. 682. What is significant, however, is that all parties concerned thought that any revisions would have to be effected pursuant to the terms of the Railway Labor Act. And see p. 68, *infra*.

Recent testimony by Assistant Secretary of Labor James J. Reynolds, before the Senate Committee on Commerce, also makes it clear that after expiration of the Award as such, the Railway Labor Act framework will govern the relationship of the parties:

"Keep in mind we still have the Railway Labor Act governing the way of life of these parties. The question is whether there

Thus, the initial benchmark for the relationship of the parties was to be set through the compulsory arbitration board, which was directed to take the public interest factors, including the safety factor, into account. As we have demonstrated, that federal action leaves no possible basis for the state laws. After the two-year period, while the manning levels established by the Award are subject to change in the manner provided by the Railway Labor Act, they remain in effect as the resolution of the matter until they are changed—that is, until an agreement is reached between labor and management to apply some other manning levels. Indeed, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen have, in practice, recognized this; they have recently served Section 6 notices on various crew consist issues, to cover the period after the two-year span of the Award runs. BLF & E Notices 2 & 3, Nov. 6, 1965; BRT Notice 1, Nov. 6, 1965.

Thus, there is absolutely no reason in this scheme for the revival of the state manning-level laws at the close of the two-year period, once the federally created authority of the Arbitration Board had determined, after considering the question of "adequate and safe transportation service," that the manning level contemplated by these laws was not necessary. Indeed, it would be paradoxical—in view of the trend to lower, more realistic crew manning levels on the

---

will be new section 6 notices filed. The question is whether the organizations will say that the diesel rule of 1937 is being violated come March 1 of 1966, and you go through the normal procedure of the Railway Labor Act all over again with mediation, emergency boards and all the rest of it."

1965 Senate Hearings, Tr. p. 999.

Representatives of the carriers testified at the 1965 hearings that new Section 6 notices were mandatory. 1965 Senate Hearings, Tr. pp. 1228, 1247.

railroads, as exemplified by the Report of the Presidential Commission, the Report of the Emergency Board, the repeal of several state manning-level laws,[46] and the Award under Public Law 88-108—to imagine that Congress intended that there would be a reversal of the trend and that after a two-year hiatus there would be a revival of the state manning-level laws.

2. Moreover, responsive to the obvious intent of Congress, the Arbitration Board made a far-reaching Award, whose most critical provisions—its extensive labor-protective provisions—are wholly inconsistent with the notion that the terms fixed by the Award would be a dead letter after two years, or that preemption of state manning-level laws would last only that time.

For example, under the job protection provision applicable to firemen, the carriers must pay very substantial severance allowances to the employees whom they are permitted to separate; and they must pay relocation allowances to others to whom they are required to offer other positions. Firemen employed from two to ten years may be separated from engine service only if they are offered a comparable job with guaranteed annual earnings for five years equal to their present compensation. If they decline the other position, they may be discharged but must receive a substantial severance payment. Award, para. II C(6), R. 86-87; 41 Lab. Arb., at 676-77.[47] Even those firemen hired

---

[46] See note 36, p. 57, *supra*.

[47] Moreover, such employees retain all accumulated seniority rights related to vacation and other fringe benefits, and any relocation expenses incurred by them must be reimbursed by the carriers. See p. 9, *supra*. (Award, para. II C(6), R. 86; 41 Lab. Arb., at 676)

within two years of the date of the Award, who took their jobs with full notice that their positions might soon be eliminated, are given liberal severance payments. Award, para. II C(2), R. 85; 41 Lab. Arb., at 676; Opinion of the Neutral Members, R. 125; 41 Lab. Arb., at 692.[48]

As to each classification, the separation allowances decreed by the Arbitration Board are at least as generous, and, in many instances, more generous, than those suggested by the Presidential Railroad Commission—which recognized (see p. 5, *supra*) that its recommendations were inconsistent with the continued validity of state minimum manning-level legislation. As of September 1965, the carriers had already made severance payments in excess of $36,000,000 pursuant to the Award.[49]

Plainly, provisions of this kind evidence an intent to provide for long-range relief. It would be an absurdity to hold that Congress intended the railroads, after they had paid millions of dollars in severance pay to employees, to rehire them after the two-year period or to employ others in the jobs declared by the Award to be superfluous. The

---

[48] Firemen holding their jobs for two years prior to the Award are to receive severance payments equal to their total salaries for six months; those employed one to two years are given full pay for three months; and even employees who have been on the job less than a year are entitled to a lump sum equal to five days' pay for each month in which they worked. (R. 125; 41 Lab. Arb., at 692)

[49] As of that time, some 4,465 firemen with two to ten years' seniority had opted to accept severance pay averaging $6,000 per man. 1965 Senate Hearings, Tr. p. 1297. Some of the allowances in this category ranged up to $9,800 per man. *Id.*, at 1449. The average amount paid to 4,600 separated firemen who had been on the job less than two years was $1,425. *Id.*, at 1451-52. In addition, 1,175 part-time firemen had received allowances averaging $2,750. *Id.*, at 1451.

purpose of Congress, and of the Award, was certainly not to provide a two year's vacation with pay.

• • • • •

In sum, the Award was limited—as is any Railway Labor Act award—only in the time in which it was binding upon the parties in the sense that they could not seek to initiate the Railway Labor Act procedures, and, ultimately, use economic methods of self-help to bring about a change in it. The fact remains that the compulsory arbitration law effected a radical, dispositive, and continuing solution on a national basis to what was essentially a national problem. When Congress enacted Public Law 88-108 and thus sanctioned a solution inconsistent with the state laws, the status quo was completely altered. It would be totally disruptive of peaceful labor relations—and of the fabric of the Railway Labor Act—to hold that upon the expiration of the Award, the Railway Labor Act framework for the revision of its terms may be totally disregarded and that, instead, the state laws may resume their effect.

II. EVEN IF THE SOLUTION PROVIDED FOR IN THE AWARD HAD BEEN REACHED THROUGH THE COLLECTIVE BARGAINING PROCESS, THAT SOLUTION WOULD HAVE SUPERSEDED THE ARKANSAS LAWS BY REASON OF THE RAILWAY LABOR ACT AND THE NATIONAL TRANSPORTATION POLICY

In Part I, our argument was based to a considerable extent on the fact that the solution reached in the Award was the work of public bodies—the Arbitration Boards—applying public-interest standards laid down by Congress. In this part, we shall demonstrate that even if the solution had been reached through a collective bargaining contract provided for under the Railway Labor Act, it would have—by reason of that Act and the National Transportation Policy—super-

seded inconsistent state legislation defining crew manning levels.[1]

In 1931, this Court summarily dismissed an argument that the Arkansas laws were preempted by the enactment in 1926 of the Railway Labor Act. The Court's entire treatment of the subject was as follows: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration." *Missouri Pac. R. Co.* v. *Norwood*, 283 U.S. 249, 258 (1931). Since that time, however, Congress has enacted comprehensive legislation dealing with labor-management relations generally,[2] as well as far-reaching laws governing employer-employee relations in the railroad industry. See Amended Railway Labor Act of 1934, 48 Stat. 1185, 45 U.S.C. §§ 151 *et seq.;* National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1. As a result, this Court has frequently been called upon to reexamine the question of the effect on state laws of the comprehensive federal enactments in the labor-management relations field, and the contours of the labor preemption doctrine have been significantly expanded. See the cases collected at pp. 23-24, *supra.* Moreover, and most significantly, at the time of the *Norwood* decision, there was no agreement or award in effect under the Railway Labor Act inconsistent with the state manning-level laws[3]—as opposed to the situation today.

---

[1] This argument, moreover, is a further proof of the point we make in Part I D above—that even after the period in which the Award "continues in effect" under § 4 of Public Law 88-108, the state manning-level laws are superseded.

[2] See Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101 *et seq.;* National Labor Relations Act, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 73 Stat. 519 (1959), 29 U.S.C. §§ 141 *et seq.*

[3] While there were agreements in states other than Arkansas at the time of the *Norwood* case which provided for manning levels

1. Since the time of the *Norwood* decision, Congress has so extended its regulation of the labor-management relations of railroads engaged in interstate commerce "as to take possession of the field" (*Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569 (1919)) covered by the Arkansas manning-level laws. In response to extensive criticism leveled at the Railway Labor Act of 1926, Congress amended the Act in 1934 to establish the National Railway Adjustment Board as a means of assuring the orderly settlement of "minor disputes." As a last resort, such disputes arising out of the interpretation and application of existing employment contracts were to be resolved by compulsory arbitration. Section 3. The amendments also added important provisions requiring the carriers to bargain collectively with employee representatives. (Section 2 First, Ninth; see, *e.g.*, *Virginian R. Co.* v. *System Federation No. 40*, 300 U.S. 515, 547-48 (1937)) Thus, the 1934 Act imposed specific duties on all carriers "to treat with" union representatives, and added a number of other provisions designed to develop the framework of collective bargaining. Section 2 Fourth, Seventh, Eighth.

---

lower than those in effect in Arkansas, there was no such agreement applicable in Arkansas. See Appellants' Reply Brief, p. 39, *Missouri Pac. R. Co.* v. *Norwood*, 283 U.S. 249 (1931). Likewise, the case of *Terminal R.R. Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), much relied on by appellants, did not involve any agreement or award inconsistent with state law.

We do not mean to suggest that our contention as to supersession by the Railway Labor Act and the National Transportation Policy would not be effective even if there were no agreement inconsistent with the state laws. The presence of these state laws, directly regulating the central labor-management controversy in the railroad industry, is an obvious block to the nationwide free collective bargaining solution of labor-management problems envisioned by that Act, and we would submit that even on this basis the local laws should not stand. However, the point is that, as a matter of fact, there is presently in effect an agreement or award inconsistent with the state laws.

With the coming of such a comprehensive framework for the resolution of labor-management disputes in the railway labor field—as there has come also in labor relations generally under the National Labor Relations Act—there has been an increasing recognition of the exclusive force of the federal legislation, superseding inconsistent state laws. This is, as we have touched on above (pp. 24-27, *supra*), particularly the case as to the effect of collective bargaining contracts entered into pursuant to the federal statutes. This Court has "on numerous occasions . . . recognized that the Railway Labor Act protects and promotes collective bargaining." *California* v. *Taylor,* 353 U.S. 553, 559 (1957). Indeed, two of the stated purposes of the Railway Labor Act—added by the 1934 amendment—are "to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act" and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." (Section 2) The Act, then, basically envisions a regime of joint, private autonomy involving the carriers and the employees—assisted by federal mediation and arbitration services—in working out the details of their labor-management relationship.[4]

---

[4] A perceptive commentator once described the railroad world for which the Railway Labor Act was designed thus: "The railroad world is like a state within a state. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J. 567, 568-69 (1937). As Mr. Justice Frankfurter pointed out, after quoting from that commentary: "The Railway Labor Act of 1934 is an expression of that 'reign of law' and provides the means for maintaining it. . . . It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions

The regime of joint, private autonomy envisioned by the Railway Labor Act is not to be disrupted by state laws impinging on labor-management relationships.[5] The key case in this area is *California* v. *Taylor*, 353 U.S. 553 (1957), where the ultimate issue presented was the applicability of the Railway Labor Act to a state-owned railroad. At the outset, the Court stated unequivocally that, if the public railroad were subject to the federal law, any collective bargaining agreements it reached "would take precedence over conflicting provisions of the state civil service laws." 353 U.S., at 561. Then, notwithstanding the absence of any specific reference to state railroads in the Railway Labor Act, the Court went on to hold unanimously that that Act superseded state legislation prohibiting collective bargaining by public employees and defining various aspects of their employment conditions.

The thrust of the decision is that uniform regulation of labor-management relations in the railroad industry, as achieved through the collective bargaining process, is imperative. The opinion emphasizes that collective bargaining by the railroads is generally regional or national in scope. For that reason, the Railway Labor Act is also " 'all-embracing in scope and national in its purpose, [and] . . . is as capable of being obstructed by state as by individual

---

and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 752 (1945) (dissenting opinion).

[5] A recent state court decision upholding full-crew legislation candidly admitted: "Perhaps, with respect to the regulation of working conditions, not related to health or safety, the field had already been preempted by the provisions of the Railway Labor Act, leaving such regulation to bargaining agreements between employee and employer." *New York Central R. Co.* v. *Lefkowitz*, 46 Misc.2d 68, 98, 259 N.Y.S.2d 76, 107 (Sup. Ct. 1965).

action.'" 353 U.S., at 566. If the agreements reached thereunder were subject to divergent state and local laws restricting their contents, a chaotic state of affairs would inevitably result. The Court therefore concluded that Congress must have "intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force." 353 U.S., at 567. See also *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956).[6]

The state civil service laws as to promotions, layoffs, dismissals, overtime and pay scales which purportedly applied to the state-owned railroad in *California* v. *Taylor* could not stand in the face of an inconsistent collective bargaining contract under the Railway Labor Act. So also, the provisions of a state law which attempts to fix the number of men a private railroad must employ—as do these Arkansas laws—may not stand in the face of an inconsistent standard—whether in the form of a collective

---

[6] *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963), was a suit to enforce the award of a system board of adjustment established by agreement of the parties in accordance with § 204 of the Railway Labor Act. In holding that a federal question was presented so as to vest jurisdiction in the federal courts, this Court once again stressed the importance of uniform treatment of contracts entered pursuant to the Railway Labor Act.

> "If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity." 372 U.S., at 691-92.

Cf. Jerome v. *United States*, 318 U.S. 101, 104 (1943).

bargaining contract or an arbitration award—made under the Railway Labor Act.

Application of the full-crew laws presently on the books in seven states would effectively destroy the very uniformity that the Railway Labor Act was designed to create. Any negotiations between the railroad companies and the appellant brotherhoods for modification of the Awards made pursuant to Public Law 88-108, or for the revision of other terms of the present employment contracts, will be primarily national in scope. The agreements so reached would, however, be made subject to an unfortunate variety of state manning-level statutes, if they were applicable.[7] *Cf. Mor-*

---

[7] One authority graphically illustrates the dimensions of the problem:

> "Variations in the size of the crews from state to state dramatize the anomaly of the full-crew laws. Great Northern's fast transcontinental freight, No. 401, runs from St. Paul-Minneapolis to the North Dakota state line with two brakemen. At Breckinridge, Minnesota, the last division point in Minnesota, the train picks up a third brakeman because North Dakota has a full-crew law. When it reaches the Montana border, the third brakeman is dropped, and all through the mountains of Montana and Idaho, No. 401 operates with two brakemen. Then when it reaches the Washington border the train takes on a third brakeman, since Washington also is a full-crew state . . . Somewhat more than half of the laws . . . have compelled increases [in the number of crew members used]. Texas, Nebraska, Wisconsin, and Mississippi require five men on all trains no matter how short; Washington requires not less than six men on any freight train of 25 or more cars. New York requires a crew of five on most trains, but a crew of six on passenger trains of six or more cars." Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960), p. 324. [A number of the statutes referred to have been repealed or enjoined.]

As of August 1, 1965 the following crew consist statutes were on the statute books: Ark. Stat. Ann. §§ 73-720 through 722, 73-726 through 729 (1957); Ind. Stats. §§ 55-1327 through 1334 (1951); Mass. Ann. Laws c. 160, § 185 (1959); Neb. Rev. Stat. §§ 74-532 through 537 (1958); Nev. Rev. Stats. § 705.390 (1963); N.Y. Railroad Law §§ 54-a, 54-b, 54-c (1952); Ohio Rev. Code §§ 4999.06-

gan v. *Virginia*, 328 U.S. 373 (1946). There can be no doubt that, if the "full-crew" laws remain operative, employment agreements reached through collective bargaining on the national level, as well as national arbitration awards, would nonetheless vary considerably in effect from state to state.[8] There can be no question that this is the type of chaotic divergence which Congress sought to eliminate when it passed the Railway Labor Act.

2. Appellants claim that, rather than falling within the general rule requiring preemption, the challenged Arkansas laws fall within an exception permitting state health and safety legislation to remain in effect. While there is a legitimate question as to whether in the light of the present state of railway technology, the high manning levels imposed by the Arkansas laws have anything to do with safety, it would be fatuous to deny that they have a very great deal to do with the direct regulation of labor-management relations. As we pointed out in Part I, they seek to

---

.08 (1954); Tex. Civ. Stats., Art. 6380 (1926); Wash. Rev. Code §§ 81.40.010-.030; Wis. Stats. §§ 192.25-.26 (1957). Maine has a statute that applies only to steam-powered passenger trains. Me. Rev. Stat. C. 46, § 60 (1954).

Of the statutes mentioned above, as we have developed in note 36, p. 57, *supra*, enforcement of the Nebraska, Nevada and Texas statutes has been suspended by judicial decree on state-law grounds, leaving seven, including the Arkansas, which apparently will be affected by the outcome of this litigation. The Nebraska statute was subsequently repealed. There has been a lower state court injunction against enforcement of the Indiana statute; and litigation is pending, in other postures, in New York and in Washington, directed to those states' statutes.

[8] Moreover, there is no guarantee that only states will enact laws in this area. Local ordinances dealing with crew consist are by no means unheard of. See *Weinberg* v. *Northern Pac. R. Co.*, 150 F.2d 645 (8th Cir. 1945); *Louisville & N. R. Co.* v. *City of Hazard*, 304 Ky. 370, 200 S.W.2d 917 (1947).

regulate the present central labor-management controversy in the railroad industry.

Accordingly—even apart from the fact that in Section 7(a) of Public Law 88-108 Congress regulated the safety aspects of the matter[9]—state laws which so directly regulate labor-management relations, already so extensively dealt with by the federal act, should not stand. Whatever safety problems may be thought to inhere in the question of crew manning levels on the railroads should be left to whatever federal legislation Congress might ever conclude was warranted.

The National Transportation Policy, set forth by Congress in 1940 (54 Stat. 899, 49 U.S.C. preceding § 1) makes it clear that Congress has recognized the need—and the federal responsibility—for promoting "safe, adequate, economical and efficient service" in the transportation field.[10] In the light of this undertaking, whatever limits that are

---

[9] See pp. 37-43, *supra*.

[10] This Court has recently emphasized the importance of the National Transportation Policy, pointing out that none of its provisions may be disregarded, since they constitute part of an operative national policy. See *ICC* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 761-62 (1963); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375, 386-88 (1964). Thus, in striking down an Arizona law regulating train lengths as an unconstitutional burden on interstate commerce, the Court determined that the statute was of dubious value as a safety measure, and stressed the impairment of the National Transportation Policy which would result if the legislation were allowed to stand:

> "[The Arizona Train Limit Law] materially impedes the movement of appellants' interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act preceding § 1, 54 Stat. 899."

Southern Pac. Co. v. *Arizona*, 325 U.S. 761, 773 (1945). *Cf. Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330, 333, 342 (1960).

to be imposed on the parties' solution of crew manning-level questions in the name of safety should be imposed by federal law—just as, in the *Oliver* case, the limits to be imposed in the name of antitrust policy on the restrictions on which the parties to a labor-management contract could impose, were left to federal law. 358 U.S., at 296.

Congress has enacted a variety of provisions to ensure safety on the nation's railroads.[11] Despite the fact that crew manning-level laws are presently in effect only in a minority of the states, Congress has never seen fit to enact any federal legislation, in the name of safety or otherwise, as to this matter.[12] Under these circumstances, and in view of the direct orientation of laws of this nature to the central problems of labor-management relations, and their peripheral relationship to safety, we submit—even apart from the effect of Section 7(a) of Public Law 88-108—that the state laws in this area are so intertwined with the subject of labor-management relations which Congress has taken in hand that they cannot stand.

---

[11] See Accident Reports Act, 36 Stat. 350, as amended, 45 U.S.C. §§ 38-43; Ash Pan Act, 35 Stat. 476, as amended, 45 U.S.C. §§ 17-21; Automatic Coupler Act, 27 Stat. 531, as amended, 45 U.S.C. §§ 1-10; Boiler Inspection Act, 36 Stat. 913, as amended, 45 U.S.C. §§ 22-34; Hours of Service Act, 34 Stat. 1415, as amended, 45 U.S.C. §§ 61-66.

[12] Indeed, numerous attempts have been made to persuade Congress to pass federal "full crew" legislation, but Congress has apparently not wished to do so. See Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 59, 74th Cong., 1st Sess. (1935). See also S. 4234, H.R. 10885, H.R. 11012, 72d Cong., 1st Sess. (1932); S. 2624, S. 2993, H.R. 7489, 73d Cong., 2d Sess. (1934); S. 152, H.R. 144, 75th Cong., 1st Sess. (1937).

III. THE ARKANSAS LAWS AMOUNT TO AN UNCONSTITUTIONAL DISCRIMINATION AGAINST INTERSTATE COMMERCE

In this part we shall demonstrate that even apart from the contentions we made in Parts I and II, the Arkansas laws cannot stand because they amount to an impermissible discrimination against interstate commerce.[1] The basic reason why these laws effect an unconstitutional discrimination against interstate commerce lies in their pattern of coverage. The laws contain exceptions which, while phrased in general terms, in practice exempt all the intrastate railroads from the legislation while including the great majority of the interstate railroads.

As reviewed in the Statement, p. 16, *supra*, ten of the eleven interstate railroads operating in the state have over fifty miles of track and thus must comply with the freight train manning-level legislation of 1907; and eight of the eleven interstate railroads have over one hundred miles of track each and are hence subject to the switching crew manning-level legislation of 1913. On the other hand, the proofs indicate that none of the state's seventeen intrastate railroads is subject to either of the two state laws.

---

[1] We also urged in the district court that these laws constitute an impermissible burden on interstate commerce. Since this contention would involve the putting in of proofs as to the nature and extent of the burden on interstate commerce, and the lack of any redeeming state interest in the legislation of a comparable nature (see *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761 (1945)), which proofs have not yet been put in, we do not urge this point in this Court, but will of course pursue it in the district court should this Court not agree with our contention that the judgment below should be affirmed. We would also pursue in the district court our contentions under the Fourteenth Amendment. *Cf. Pennsylvania R. Co.* v. *Driscoll*, 330 Pa. 97, 198 Atl. 130 (1938), 336 Pa. 310, 9 A.2d 621 (1939); *Weinberg* v. *Northern Pac. R. Co.*, 150 F.2d 645 (8th Cir. 1945).

The extent to which the pattern of coverage of these laws discriminates against the interstate carriers is vividly illustrated by the fact that, viewed in terms of trackage in Arkansas, 99.85% of the interstate railroad mileage is subject to the 1907 legislation, and 99.32% is subject to the 1913 legislation. (Plaintiffs' Ex. 6, R. 203) On the other hand, literally none of the trackage of the intrastate railroads is subject to either of the two Acts. Thus, the two Acts fall only slightly short of perfection in effecting a discrimination against the interstate carriers.

1. It is absolutely clear that discrimination of this nature against interstate commerce is forbidden. As early as 1879, this Court stated that:

> "[I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose on the products of other States brought therein for sale or use, . . . or the transportation thereto of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

Guy v. *Baltimore,* 100 U.S. 434, 439 (1879). That principle has been steadfastly followed over the years. See, *e.g.*, *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946); *Best & Co.* v. *Maxwell,* 311 U.S. 454 (1940).[2] Furthermore, it has been applied just as strongly against state laws enacted

---

[2] While the rule forbidding discrimination against interstate commerce has been invoked most often in tax cases, it is logically insupportable to limit the prohibition to revenue legislation—as the appellants urged below—and the courts have never restricted the rule to that context. See *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951); *Hussey* v. *Campbell,* 189 F.Supp. 54, 59 (S.D. Ga. 1960), *aff'd on other grounds,* 368 U.S. 297 (1961). *Cf. Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U.S. 361 (1964).

to promote the public safety, when shown to be discriminatory in nature. *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951); *Hale* v. *Bimco Trading, Inc.,* 306 U.S. 375, 379-80 (1939); *Brimmer* v. *Rebman,* 138 U.S. 78, 81-82 (1891). Thus, even assuming that the Arkansas laws were perfectly valid safety regulations, that status would be insufficient to save them from the charge of discrimination against interstate commerce.

It goes without saying that even though state legislation such as that enacted by Arkansas may appear on its face to treat interstate and intrastate carriers equally, it is nonetheless unconstitutional if its effect is discriminatory: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-56 (1940). See also *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946).

2. The Arkansas laws may not be sustained on any supposition that there is a rational basis, not referable to simple discrimination between interstate and intrastate carriers, for their pattern of coverage. The fact of the matter is that clearly there is no basis for the exemptions in terms of the supposed safety considerations which are said to have prompted the laws.

(a) This is vividly demonstrated by the switch crew manning-level legislation of 1913. That legislation exempts carriers with less than one hundred miles of track from its coverage. But switching operations are by their very nature local; the same sorts of hazards inhere in them without regard to how many miles of main line track the

carrier has. The hazards of a switching operation in Arkansas are the same whether the main line of the carrier running the switching operation in question runs only to a connection with the line of another carrier twenty miles away, or whether the carrier running the switching operation happens itself to be a transcontinental railroad. This obvious fact has been recognized judicially: "[I]t would seem that the dangers inherent in switching operations are equally great on short line roads as on roads of greater length." *New York Central R. Co.* v. *Lefkowitz*, 46 Misc.2d 68, 95, 259 N.Y.S.2d 76, 105 (Sup. Ct. 1965).

(b) The irrationality of the exemption provided by the 1907 legislation relating to freight train crew manning levels is a little less obvious, but just as real. It is true that freight train manning-level requirements may bear some relationship to the length of train runs. Indeed, the local Special Board of Arbitration here recognized this by requiring two brakemen on main line operations, and one on branch lines. See p. 13, *supra*. But the Arkansas exemption is not related to the length of the particular freight train movement, or to main lines and branch lines, but is related only to the total length of a carrier's lines. The exemptions thus are completely out of phase with any basis for them. An intrastate carrier with a line of forty-five miles, making main line runs over its entire line, is exempt from the legislation. An interstate carrier with over fifty miles of line is subject to the legislation on all its freight train movements within Arkansas, including branch line operations of the shortest nature.[8]

---

[8] The discriminatory nature of the 1907 legislation is made clearer by the fact that the Arkansas courts have construed it as being applicable to interstate railroads even though they have less than fifty miles of track in Arkansas, if their overall system mileage exceeds fifty miles. See *Kansas City Sou. R. Co.* v. *Arkansas*, 116

Accordingly, the Arkansas freight train manning-level laws must likewise be considered an impermissible discrimination against interstate commerce. The decisions of this Court teach that, even in the case of a generally permissible state regulation which has an incidentally discriminatory effect against interstate commerce, the state legislation is forbidden "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951). So here, Arkansas might have enacted a nondiscriminatory freight crew manning-level law with exemptions based on the length of the movement[4] rather than using the virtually irrelevant factor of total length of the carrier's track. In the light of the nondiscriminatory alternatives plainly available, the 1907 legislation cannot stand. *Cf. Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959).

3. The effect of these two discriminatory laws is clear and substantial. Through collective bargaining with the very labor organizations that have intervened in this litigation, the exempted intrastate carriers have been able to fix significantly smaller crew consists than those required

---

Ark. 455, 174 S.W. 223 (1915). Thus, if there were two carriers running between a city twenty-five miles inside Arkansas and a point on the Arkansas state line, and one carrier's line stopped there and the other carrier's line continued on for more than twenty-five miles in the neighboring state, the interstate carrier would be subject to the 1907 Act and the intrastate carrier would not, although their operations in Arkansas were identical. This would be the case even if the intrastate carrier made a through connection with the interstate carrier at the state line. *Cf. Kansas City Sou. R. Co.* v. *Arkansas*, 213 Ark. 906, 214 S.W.2d 79 (1948).

[4] That is, it might have enacted such a law apart from the considerations urged in Parts I and II.

by the two laws. (Plaintiffs' Exs. 9, 13 and 14, R. 208-09, 221-22, 222-24.)

It is one thing for a state to have full crew laws in order to maintain safety—or frankly to assure a maximum number of jobs for its railroad workers—but quite another if such legislation is drafted in a manner that will make it applicable only to interstate carriers, with local railroads left completely unfettered. In such situations, "provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946). *Cf. King* v. *United States*, 344 U.S. 254 (1952). Since they effect an impermissible discrimination against interstate commerce, the Arkansas laws cannot stand.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

ROBERT V. LIGHT
Boyle Building
Little Rock, Arkansas 72201

THURMAN ARNOLD
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees

Of Counsel:

W. J. SMITH
H. H. FRIDAY
Little Rock, Arkansas

MARK M. HENNELLY
R. W. YOST
St. Louis, Missouri

ARNOLD & PORTER
Washington, D. C.

November, 1965

APPENDIX I

The Commerce Clause

United States Constitution, Article I, Section 8, Clause 3:

"The Congress shall have Power—.

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . "

APPENDIX II

The National Transportation Policy

The National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act [The Interstate Commerce Act], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of

the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act [The Interstate Commerce Act], shall be administered and enforced with a view to carrying out the above declaration of policy."

APPENDIX III

The Railway Labor Act

Sections 2 and 5 through 10 of the Railway Labor Act of 1926, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151a, 152, 155-60:

"§ 2. GENERAL PURPOSES.

"The purposes of this Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"*First. Duty of carriers and employees to settle disputes.*

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and

maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"*Second. Consideration of disputes by representatives.*

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"*Third. Designation of representatives.*

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"*Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.*

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. Agreements to join or not to join labor organizations forbidden.

"No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has

been discarded and is no longer binding on them in any way.

"*Sixth. Conference of representatives; time; place; private agreements.*

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"*Seventh. Change in pay, rules, or working conditions contrary to agreement or to section six forbidden.*

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"*Eighth. Notices of manner of settlement of disputes; posting.*

"Every carrier shall notify its employees by printed notices in such form and posted at such times and places

as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the

Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. Violations; prosecution and penalties.

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his

labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

"Eleventh. Union security agreements; check-off.

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assess-

ments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 3 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a

member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

* * * * *

"§ 5. FUNCTIONS OF MEDIATION BOARD.

"First. Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said

Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. Interpretation of agreement.

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents.

"The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

"(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the par-

ties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each con-

tract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

"§ 6. Procedure in Changing Rates of Pay, Rules, and Working Conditions

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

"§ 7. ARBITRATION.

"*First. Submission of controversy to arbitration.*

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 1-6 of this Act such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

"Second. Manner of selecting board of arbitration.

"Such board of arbitration shall be chosen in the following manner:

"(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

"(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

"Third. Board of arbitration; organization; compensation; procedure.

"(a) Notice of selection or failure to select arbitrators.

"When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

"(b) *Organization of board; procedure.*

"The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

"(c) *Duty to reconvene; questions considered.*

"Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

"Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

"(d) *Competency of arbitrators.*

"No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

"(e) Compensation and expenses.

"Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

"(f) Award disposition of original and copies.

"The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

"*(g) Compensation of assistants to board of arbitration; expenses; quarters.*

"A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

"Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

"*(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.*

"All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

"Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

"§ 8. AGREEMENT TO ARBITRATE; FORM AND CONTENTS; SIGNATURES AND ACKNOWLEDGMENT; REVOCATION.

"The agreement to arbitrate—

"(a) Shall be in writing;

"(b) Shall stipulate that the arbitration is had under the provisions of this Act;

"(c) Shall state whether the board of arbitration is to consist of three or of six members;

"(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

"(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

"(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

"(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

"(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

"(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided,* That the parties may agree at any time upon an extension of this period;

"(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

"(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings

shall constitute the full and complete record of the arbitration;

"(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

"(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

"(n) Shall provide that the respective parties to the award will each faithfully execute the same.

"The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

"§ 9. AWARD AND JUDGMENT THEREON; EFFECT OF ACT ON INDIVIDUAL EMPLOYEE.

"*First. Filing of award.*

"The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

"*Second. Conclusiveness of award; judgment.*

"An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

"*Third. Impeachment of award; grounds.*

"Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

"(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a

party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"Fourth. Effect of partial invalidity of award.

"If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. Appeal; record.

"At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"*Sixth. Finality of decision of court of appeals.*

"The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"*Seventh. Judgment where petitioner's contentions are sustained.*

"If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

"*Eighth. Duty of employee to render service without consent; right to quit.*

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

"§ 10. EMERGENCY BOARD.

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential

transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."